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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-927

HAROLD S. RIFKIN,

Petitioner,

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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INTRODUCTION

This is a *Petition for a Writ of Certiorari* addressed to The United States Supreme Court. The petitioner is Harold S. Rifkin, a United States citizen. The petition urges review and reversal of The Decision of The United States Court of Claims, dated April 14, 1976, in the Case of Plaintiff vs. The United States Court of Claims, Docket Number 437-70, which reversed a decision of The Trial Judge of The United States Court of Claims dated July 2, 1975, which decision was favorable to plaintiff. The petitioner is not an attorney but is presenting this petition *Pro Se*, as he has not the funds required to retain a competent attorney.

Plaintiff further seeks all rights and entitlements granted him by the Court of Claims Trial Judge or any other relief this Honorable Court may deem appropriate in the premises.

PRELIMINARY STATEMENT AS TO TIMELINESS

Appellant's petition to The United States Supreme Court For Writ of Certiorari was not filed within the period established by rules of The United States Supreme Court.

It was physically impossible, due to conditions beyond his control, for appellant to file a timely Petition For Writ of Certiorari with The United States Supreme Court or, in lieu thereof, to timely file a Petition for Extension of Time in which to file a Petition For Writ of Certiorari. Appellant was not negligent and acted with all available diligence.

GENERAL HISTORY OF THE CASE

1. Appellant terminated from his Civil Service position.

2. Appellant took administrative grievance appeal.

3. Grievance Examiner, after hearing testimony, decided in full for appellant.

4. Command refused to follow Grievance Examiner's finding and recommendation after an improper, secret receipt of *ex parte* letters.

5. Appellant filed action in United States Court of Claims.

6. Court of Claims Judge, after hearing testimony, studying evidence, and evaluating arguments, decided in full for appellant.

7. United States government appealed decision to United States Court of Claims Appellate Division.

8. United States Court of Claims Appellate Court reversed Trial Judge's decision.

9. Appellant now appeals to United States Supreme Court.

CIRCUMSTANCES OF THE CASE

1. The Trial Judge of the Court of Claims in his opinion, filed July 2, 1975, stated:

"CONCLUSION OF LAW"

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to judgment ordering his restoration to his former position in the Department of the Army or to an equivalent position in grade GS-12, and that plaintiff is entitled to back pay from April 13, 1965, until the date of such restoration to duty with the exception of the period from June 8, 1968 to December 8, 1970.

IT IS THEREFORE ORDERED, pursuant to 28 U.S.C. § 1491 and Rule 147(c), that the Secretary of the Army be and he is hereby directed to reinstate plaintiff to the position he formerly held or an equivalent position at the same grade.

IT IS FURTHER ORDERED, that the amount of recovery due plaintiff will be determined in further proceedings pursuant to Rule 131(c)."

In its decision of April 14, 1976, the court adopted only so much of the Trial Judge's opinion as pertained to plaintiff's recovery of salary for the period of April 13, 1965 to August 30, 1965, the period during which plaintiff was wrongfully denied duty status, although this period should properly have terminated on September 17, 1965, the date on which plaintiff was actually separated. Rule 147(b) of the Court of Claims states:

"Trial Judge's Report: The court may adopt the trial judge's report, including conclusions of fact and law, or may modify it, or reject it in whole or in part, or direct the trial judge to receive further evidence, or refer the case back to him with instructions. *Due regard shall be given to the circumstance that the trial judge had the opportunity to evaluate the credibility of the witnesses; and the findings of fact made by the trial judge shall be presumed to be correct.*" (Emphasis supplied).

It is the belief of plaintiff that this last portion of the rule was disregarded to the detriment of plaintiff's rights and resulted in the further errors alleged by plaintiff.

2. The decision of April 14, 1976, stated, pages 17 and 18:

"In addition the trial judge relied (as showing abuse of discretion) on (a) testimony by officials at the immediate level of command that plaintiff's motivation was the higher prestige of

being considered and treated as a GS-13, not the desire to defraud the United States out of the $351 extra cost of first-class transportation on the vessel; (b) testimony that these first-level officials deliberately put out of their minds as inappropriate considerations, their personal evaluations of 'intent or human frailties, sympathy, or compassion'; and (c) the evidence that these same first-level officials mistakenly thought that they had a choice only between a minimal punishment (such as suspension for no more than 30 days) and the ultimate sanction of removal.

After setting aside, on these grounds, the penalty of removal imposed by the Department, the trial judge held, 'On an overall view of the evidence in the record and in light of the permanent adverse effect that plaintiff's single transgression has already had on what was up to then a promising career,' that a suspension without pay in excess of 2½ years would be unduly harsh and an abuse of discretion.

We do not agree with this evaluation and analysis and conclude, on the contrary, that the record does not show an abuse of discretion by the Department of the Army.

In the first place we think the trial judge's approach slights the cardinal fact that the ultimate decision was made by the office of the Secretary of the Army. It is that decision we are reviewing, not the first or second level determinations made in Europe. And there is no convincing evidence that the Secretarial level was under the

> same misapprehensions as the first-level officers who testified at the trial and on whose evidence the trial judge rests so heavily. . . ."

Justice and equity must require that a more reasonable interpretation be taken, than that demonstrated by the court, in the above statement, because:

a. The decision by the office of the Secretary of the Army to sustain the decision to remove plaintiff could not have been made had Colonel Larsen not made the original decision for removal. The trial judge consistently pointed out that Colonel Larsen was not aware of the procedures or even the regulations governing penalties when he made his decision. Had the original decision been for a lesser penalty, as it would no doubt have been had Colonel Larsen studied and understood the regulations and procedures; considered the mitigating circumstances he finally admitted to during the trial proceedings; and exercised the informed discretion required of him by Department of the Army Civilian Regulations, CPR C2.1-6a and C2.4-2a.(1), the penalty would no doubt have been accepted by plaintiff, or if appealed, could not have been increased by the office of the Secretary of the Army. The Secretarial level decision was based on his subordinates' decision. *A Fortiori*, if the subordinates' decision was wrong, his could only be wrong. Actually, there was no evidence whatever that the Secretarial level was not under the same, admitted, misapprehensions of the first-level officers.

b. Even more vitally, the Court's decision points out (page 19) that the Employment Policy & Grievance Review Board asked for "a comprehensive report with respect to the basis for – equity of decision in appellant's case when compared to certain similar cases involving military personnel –." The Board was never told that what has been amply demonstrated by the record in the Court of Claims, the actions of Colonel Larsen in the removal of plaintiff demonstrated bias and were arbitrary, capricious and contrary to the expressed Department of the Army policy of equal treatment under the law, as admitted on the witness stand at the trial hearing when he testified:

> "He told that he would put in papers to get out of the Army if I gave him nonjudicial punishment. Based on that I did give him nonjudicial punishment under Article 15." (p. 184, Transcript of Testimony, lines 11-14); "anyway, the higher headquarters in Orleans in reviewing my decision reduced the fine to $300, although I had fined him $800. McBreen at the same time, within a very few days, put in to get out of the Army; and he was out of the Army in very short order. But he did end up getting a pension." (p. 185, lines 2-7); and "my testimony that I realize we use different standards to punish wrongdoing within the military as contrasted to within the Civil Service was based on my belief (which I still hold) that punishment of the military is typically more severe than punishment within the Civil Service." (p. 4, Defendant's Exhibit 29)

These actions and statements are contradicted by his action in removing plaintiff from the Federal Service, who had over 23 years of service, without offering to plaintiff the opportunity to resign, retire or otherwise voluntarily leave the employment of the U.S. Army Procurement Center or the Department of the Army, in exchange for accepting a lesser punishment, as he did in the case of Major McBreen.

In the name of justice, and on this point alone, how can the court's decision that a fair and impartial review at Secretarial level, corrected or negated all defects occurring at the lower levels of the administrative hearing process be allowed to stand?

c. The witnesses, upon whom the court says the trial judge rests so heavily, were not witnesses for the plaintiff, but were, in fact, witnesses for the government, called by counsel for the defendant, and his associate counsel (from the Litigation Division, Office of the Judge Advocate General, Department of the Army). At no time, either through any brief, or through witnesses or oral argument at either the trial or the appellate hearing, did counsel for the defendant ever offer the defense, nor could he, in good conscience, that all defects in the entire administrative hearing process were corrected by the review at Secretarial level. Had counsel for the defendant desired to avail himself of this defense, nothing precluded his calling personnel connected with that review, as witnesses for the defendant, at the trial, and the record bears out the fact that he did not do so. If he had, plaintiff would have been able to establish through cross examination, that the hearing and review at the Secretarial level was no more fair, than the decision of Colonel Larsen to remove, or the decision of the Commander-in-Chief, US Army Europe (CINC-USAREUR), to overrule his own Hearing Examiner and sustain the removal decision of Colonel Larsen.

Counsel for the defendant constantly advanced the defense, that the review at Secretarial level was as fair and impartial as the review at the two lower levels in Europe. Both, the court and the trial judge established that the decision and review at the lower level were defective. Plaintiff cannot see how the court, which is supposed to be fair

and impartial in the administration of justice and equity, can impute to the defendant, a defense he does not claim for himself, to the detriment of plaintiff.

d. The court completely disregarded the findings of the trial judge, after his examination of the witnesses and examining the record, that the review at the Secretarial level did not correct, but rather repeated the defects at the lower levels when he stated: (Trial Judge's opinion, pages 17-24)

> "The record in this case establishes that the commanding officer who imposed the penalty of discharge was under a misapprehension of material fact which was conveyed to and was accepted by his superiors at every level of review. Throughout the proceedings beginning with the decision of Colonel Larsen runs the theme that plaintiff had deliberately attempted to and did defraud the United States Government out of money or moneys worth and therefore he could not be trusted in his important position in connection with the disbursement of large sums of money. Major General Kyser in his *ex parte* communication of July 2, 1965, to the Commander in Chief, Europe, urging that the grievance examiner's recommendations be overruled did so on the grounds that plaintiff having committed "fraud against the United States" his sense of propriety was inconsistent with his fiduciary responsibilities, and that "retention of an employee who is known to have committed a fraud against the United States" would unfavorably affect the integrity of others. Both the Commander in Chief, Europe and the Secretary of the Army, as well as the boards

which assisted them accepted Colonel Larsen's characterization that plaintiff had used the altered documents to defraud the United States. No document in the record shows that any of them gave any express consideration to either agree or disagree with the question raised by the grievance examiner in her opinion when she noted that "there is no regulation which states that Mr. Rifkin was *not*, even as a GS-12, precluded from first class accommodations" and that the $351 would have been considered an acceptable Government cost on another sailing date.

Title 5 U.S.C. § 5731 provides that the allowance for transportation expense for government employees, generally "may not exceed the lowest first-class rate by the transportation facility used." The Standardized Government Travel Regulations issued by the Executive Office of the President, Bureau of Budget, pursuant to statutory authority in effect during 1965, provides:

3.6 Accommodations on trains, steamers, and airplanes.

- - - - - - - - - - - - - - - - - -

b. Steamer accommodations.

(1) Staterooms. – The minimum first-class accommodation will be allowed when stateroom is included in cost of passage or is a separate charge, - - - The travel order or other administrative determination may, however, specify the use of an accommodation less costly than the minimum first-class accommodations when suitable for a particular voyage. - - -

The Department of the Army's Travel Regulations (CPR T3) state at paragraph 1-2, that the Government Travel Regulations permit the exercise of administrative discretion by the Secretary of the Army, and therefore, where such administrative authority has been exercised in the regulations to prescribe less than the legal minimum, the regulations are the controlling authority." But none of the Civilian Travel Regulations produced by defendant states less than first-class travel has been prescribed for GS-12 employees and that they are not entitled to the lowest first-class steamer accommodations such as were booked by the MSTS officer on the SS United States for others. Nor did plaintiff 's travel authorization limit plaintiff to less than the lowest first-class steamer accommodations to which he was entitled under the Standardized Government Travel Regulations.

The undisputed testimony was that there was no fixed dividing line between grades entitled to first class and grades entitled only to lesser accommodations, - - - Thus, it appears that assignment of preferred accommodations in order of rank or grade was merely an orderly method of allocation to suit the requirements of a particular day's reservations. Accordingly, while plaintiff's use of an altered travel authorization falsifying his grade was unquestionably an improper act designed to obtain unwarranted advantage over others, it does not necessarily follow, as Colonel Larsen assumed and his superiors accepted, that it was designed to or in fact did defraud the United States out

of money or moneys worth to which under no circumstances was the plaintiff entitled.

At the time the removal was effected neither Colonel McKee nor Colonel Larsen accurately understood the process by which the transportation command assigned accomodations. - - - Both of these men, therefore, regarded plaintiff's action as an attempt by him to obtain something to which he would never have been entitled without the falsified order. Both perceived the falsification to be a deliberate attempt to defraud the Government.

When the actual process was called to the attention of Colonel McKee and Colonel Larsen at the trial, and it was explained that the cut off varied from trip to trip, both men admitted this affected their perception of the seriousness of the offense. Colonel McKee testified, "It would certainly have removed one element of the culpability, in my opinion." Colonel Larsen testified, "It is a mitigating circumstance, yes sir."

The record also discloses that despite the reason given in their removal notice those responsible for that decision did not in fact believe that plaintiff's falsification of his grade was motivated by desire to defraud the United States, but disregarded their own evaluation because of a lack of comprehension as to the nature and scope of their discretionary function with respect to meting out penalties. At the time of the incident, Major Murphy, the Procurement Judge Advocate, had known plaintiff for almost three years. Major Murphy was convinced that plaintiff's motiva-

tion in the falsification was a desire for prestige ("to be a big shot"); he had no doubt that plaintiff would never steal a dime from the Army. He conveyed this appraisal to Colonel Larsen, who, as a newcomer, sought the advice of others on his staff. Colonel Larsen admitted that he had no reason to differ with Major Murphy's appraisal; several others on his staff had concurred with this view of plaintiff's basic honesty in his duties but desire for prestige. Colonel Larsen, however, also relied on Major Murphy's legal advice that while as a layman he could accept such appraisal of plaintiff, his motivation and his basic honesty, as a matter of law he was required to disregard such considerations in imposing punishment.

> While a false statement is in itself an offense justifying punishment, it is not necessarily of the same order of gravity as an attempt to defraud or cheat the United States. *Cf. Urbina v. United States*, 180 Ct. Cl. 194, 218-19 (1967). Yet this was the essence of the removal notice and was repeated at every level of review (other than by the grievance examiner) as the reason for affirming the removal.[3]
>
> -
>
> For the foregoing reasons the decision removing plaintiff represents an abuse of Discretion and cannot stand."

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[3] The extent of plaintiff's fiduciary responsibilities was also grossly exaggerated and reiterated at every level of review. His function was primarily accounting. He neither handled nor exercised any discretion with respect to the disbursement of funds.

It is difficult to reconcile the opinion of the court, that the hearing at Secretarial level cured all defects at the lower levels when the opinion of the trial judge referred to this review four times in the above excerpt as accepting (three times) and repeating (once) the defects charged by the trial judge, to Colonel Larsen, thereby leading to his conclusion that the decision "represents an abuse of discretion and cannot stand."

e. The court in its determination that the review at the Secretarial level was fair and impartial and corrected all defects contained in the actions at the lower levels in Europe, failed to take into account that this level, just as the others, failed to take into account the failure to comply with the Department's own regulations, which state:

> "Change 7, CPR S1.2, paragraph 1-2 (b), dated 16 February 1961, titled "Job Protection Requirements."
>
> Principles
>
> b. The requirements reflect the principles that the employee shall have a full notice of the reasons for a proposed action; adequate time and opportunity to explain why the action should not be taken; and a notice of final decision explaining the reasons for the decision. In applying these principles, the following will be observed:
>
> (1) It will be noted that the procedures require meticulous attention to detail in terms of specifity of notice, duration of the notice period, and the contents of the final decision. In the event of a grievance, an appeal, or a request for judicial review, the failure to observe these

> procedural requirements will result in a reversal, notwithstanding the fact that the action may have been warranted.
>
> (2) Upon review to determine the merits of a particular adverse action, the action must stand or fall on the basis of the contents of the advance notice. - - - -."

Change 2, CPR s1.3, 25 May 1962, Paragraph 3-10.a:

> "Suspension" is a temporary nonpay status and absence from duty for a specific continuous period *required by the appointing officer* for any reason other than lack of work or a shortage of funds. IN ADDITION, THIS INCLUDES THE PLACING OF AN EMPLOYEE ON ENFORCED ANNUAL LEAVE UNDER CERTAIN CIRCUMSTANCES WHICH ARE TANTAMOUNT TO SUSPENSIONS (5) BELOW. - - - (5) IN A PERSONAL, DISCIPLINARY TYPE SITUATION, THE PLACING OF AN EMPLOYEE ON LEAVE WITHOUT HIS CONSENT WHEN HE IS READY, WILLING AND ABLE TO WORK CONSTITUTES A SUSPENSION.

CPR E2.5, dated 22 June 1962, Paragraph 5-8c; Special Provisions for Overseas Employees:

> If the employee files an appeal and requests authority to remain in the Command, the installation will extend the notice period and inform the employee that he will be retained at the installation in a duty status pending the hearing and final disposition of the appeal at the major command level . . . The employee may

also be permitted to remain at the installation in an annual leave or leave without pay status PROVIDED THE SUBMISSION OF A WRITTEN REQUEST FOR SUCH LEAVE IS A COMPLETELY VOLUNTARY ACTION ON THE PART OF THE EMPLOYEE. Enforced annual leave will not be directed by the installation for the purpose of removing the employee from a duty status.

CPR E2.7. dated 22 June 1962, Paragraph 7.1a:

The basic intent of these grievance and appeal procedures is to insure that the employee's point of view has received full and objective consideration and that such consideration has resulted in an equitable decision. In keeping with this intent, it is essential that all decisions, at any level, be based upon facts which are developed during the grievance and appeal process; be fully responsive to the employee's allegations, questions, or expressions of dissatisfaction; and where the decision is adverse to the employee, contain a full and understandable explanation of the decision. Each decision will be accompanied by a copy of those portions of the grievance or appeals record which do not contain classified defense information and which have not previously been made available to the employee."

Paragraph 2-1.b.(2), continued in the same vein, stating appeal or request for judicial review, the *failure to observe procedural requirements will result in a reversal,* notwithstanding the fact that the action may have been warranted.

Since the court concedes that the defects charged by plaintiff, and found to be factual, by the trial judge, actually occurred at the lower levels, the failure of the review at the Secretarial level to acknowledge these procedural errors and order a reversal, on that basis alone, should invalidate the court's finding that the Secretarial level review removed all defects.

Paragraph 2-1.b.(2), continues in the same vein, stating upon review to determine the merits of a particular adverse action, the action must stand or fall on the basis of the contents of the advance notice. There was no mention in the advance notice of any action which transpired in New York. Despite this, a major procedural error occurred when this point was raised first at the grievance hearing and second, in the 2 March 1966, *ex parte* letter, signed by Brigadier General Warner, in the name of the CINC-USAREUR, and addressed to Department of the Army, ATTN: Grievance Branch, designed to convince the Secretary to uphold the CINC-USAREUR's decision. This use of charges, not included in the advance notice, was brought to the attention of the Department of the Army, in a letter from plaintiff's then counsel, dated 22 August 1966, commenting on the three *ex parte* documents, furnished plaintiff. The failure to reverse the decision, on this serious procedural error casts serious doubt on the impartiality and fairness of the Secretarial level review. This same incident was brought up repeatedly by counsel for the defendant, all through the record of the proceedings in the Court of Claims. The major argument advanced by counsel for defendant, at the appellate hearing on the trial judge's opinion, on February 5, 1976, was a reiteration of this event, not included in the advance notice.

Both, paragraph 5-8c, CPR E2.5 and Change 2, paragraph 3-10.a, CPR S1-3 state that enforced leave, or the placing of an employee on leave, without his consent when he is ready, willing, and able to work constitutes a Suspension. Both, the trial judge, and the court found plaintiff's contention that he was illegally suspended, during the period his appeal was pending at Hq. USAREUR and awarded him back pay for this period (although the period was erroneously terminated on 30 August 1965, and not on 17 September 1965, the actual date of separation, because of transmission of CINC's decision to plaintiff through channels). Failure of the review at Secretarial level to admit this major procedural error and order a reversal substantiates once more that this review did not correct the defects, occurring at the lower level, as maintained by the court.

Paragraph 7-1.a, CPR E2.7, dated 22 June 1962 specifically requires that a copy of all documents, not containing classified defense information, considered during the grievance or appeal review, will be furnished the employee. Failure to furnish plaintiff with these *ex parte* documents, negated any claim that the Secretarial level review was fair, impartial, or corrected any procedural errors, but did, in fact, add to them. This is borne out by the fact that:

a. During the review at CINC-USAREUR level the following listed six *ex parte* documents, were considered in arriving at the decision. Not only were these six documents not furnished to plaintiff along with the CINC-USAREUR decision, as required by the regulation, but documents number 1, 2, 4 and 6 were never made known to plaintiff until February 1972, almost seven years later, when they were submitted to the Court of Claims, by counsel for defendant, as part of his lists of Defendant's Exhibits. Documents 3 and 5 were furnished to plaintiff's counsel for comment, on

28 July 1966, eleven months subsequent to the CINC's decision, and then only after John F. Griner, National President of the American Federation of Government Employees (AFL-CIO) requested that any *ex parte* evidence be furnished plaintiff. These six documents were:

1. Memorandum For Record, 20 May 1965, by appointing Officer. (DX 1)

2. Memorandum 24 June 1965, Civilian Personnel Officer, USACOMZEUR thru Staff Judge Advocate, to Commanding General, COMZ, and Comment 2, thereto from Staff Judge Advocate. (DX 2)

3. Letter CG, USACOMZEUR to CINC-USAREUR, dated 2 July 1965. (DX 3)

4. Letter Order 7-7, Hq. USAERUR dated 15 July 1965. (DX 4)

5. Memorandum 27 July 1965, Review Panel to CINC-USAREUR. (DX 4)

6. Memorandum 16 August 1965, Deputy Chief of Staff, Personnel & Administration to CINC-USAREUR. (DX 5)

Not only did the Secretarial level review fail, once again, as required by its own regulation, to order a reversal of the decision because of these additional procedural errors, but it compounded its failure by again withholding from plaintiff four more *ex parte* documents. Of these four documents listed below, documents number 1, 2 and 4 were not made available to plaintiff until six years later, when they were submitted as exhibits for the defendant, by defendant's counsel. Document No. 3 was made available to plaintiff's counsel in response to letter from AFGE referred to above:

1. Message to CINC-USAREUR from Department of the Army cited in CINC-USAREUR message to USACOMZEUR, 17 February 1966, requesting additional data. (DX 11)

2. CINC-USAREUR message to Dept. of the Army, 25 February 1966. (DX 12)

3. Letter, Hq. USAREUR, signed by Brig. Gen. Warner, 2 March 1966. (DX 12)

4. Memorandum for Record, 12 July 1966, Office of the Under Secretary of the Army, Employment Policy and Grievance Review Staff, signed by Mrs. Ella V. Bode. (DX 15)

The strongest demonstration, that the Secretarial level review was not fair and impartial, but demonstrated that it made no attempt to comply with its own regulations, occurred when after being challenged by Mr. Griner, on its condoning the use of *ex parte* evidence, went through the motions of making this material available for review by furnishing plaintiff and his counsel three (3) of ten (10) documents, implying that this was the sum total of such documents. This demonstrates wanton disregard of the rights of the appellant, whose case they were supposedly reviewing in a fair and impartial manner.

f. A most significant procedural error occurred at both the appointing officer level, USAREUR level and Secretarial level reviews, in that the removal of plaintiff was patently inconsistent with paragraph 4-2.a.(1), CPR 2.4, dated 5 February 1964, which states:

> "(1) The action taken must be consistent with the precept of like penalties for like offenses, with due consideration for mitigating or aggravating circumstances in each case. The penalty should be

> fair, equitable and no more severe than that which sound judgement indicates is required to correct the situation and maintain discipline."

That the appointing officer, Colonel Larsen was not concerned that the penalty administered to plaintiff "must be consistent with the precept of like penalties for like offenses" or that "the penalty should be fair and equitable", was evidenced by his testimony, as discussed in paragraph 2b, above and in the excerpt of the trial judge's opinion cited in paragraph 2d, above. In considering the precept "of like penalties for like offenses", four (4) other cases in the USAREUR area must be considered. The first two involve Major McBreen and another Civil Service employee in the appointing authority's own organization, the U.S. Army Procurement Center, Frankfurt; the third case is that of *the* Civilian Personnel Officer who certified that the appointing officer's "Notice of Decision" "meets the regulatory and procedural requirements of DA CPR S1" even though it contained an improper suspension (see paragraph 2 e above); and the fourth case involves a Civil Service employee (Deputy Comptroller), in Berlin Command, which is a major element under the CINC-USAREUR.

Case No. 1: Major McBreen, a Contracting Officer at the Procurement Center, falsified a travel voucher (18 U.S.C. 1018) and presented a fraudulent request for payment (18 U.S.C. 287, 1001). In exchange for a promise to immediately apply for relief from active duty, and retirement, was recommended for Nonjudicial Punishment, under Article 15, by Colonel Larsen. The $800 fine recommended by Colonel Larsen was reduced by Major General Kyser to $300. This case was discussed in paragraph 2b, above.

Case No. 2: Mr. Kammons, a Contracting Officer's Representative, a GS-11 Civil Service Employee, at the Procurement Center, admitted that he falsified a Travel Claim. On the face of the travel voucher filed by Mr. Kammons appears the following statement, above the signature block: "Fraudulent Claim – Falsification of an item in an expense account works a forfeiture of the claim (28 U.S.C. 2514) and may result in a fine of not more than $10,000 or imprisonment for not more than 5 years or both (18 U.S.C. 287); id. 1001)." For this serious "on duty" offense Mr. Kammons was given a two day suspension, by Colonel Larsen, the same appointing officer who removed plaintiff.

Case No. 3: Mr. James H. Rowe, Sr., a GS-14 Civil Service employee, was the Civilian Personnel Officer, Headquarters Taunus District, in Frankfurt, and as such was also the Civilian Personnel Officer for the Procurement Center. The Officers of Local 2348, Greater Frankfurt Local, American Federation of Government Employees (AFL-CIO) filed charges that Mr. Rowe had falsified his qualifications for employment and promotion by claiming ninety four hours of college credit from a Business School, which not only gives no college credit, but which claimed that he only attended two very short courses. Was Mr. Rowe removed or suspended during the investigation? Certainly not. He was allowed to remain in his highly sensitive position, except during the period he was allowed to go on "Home Leave."

When the charges were proved, was Mr. Rowe, the GS-14 Civilian Personnel Officer separated for this very serious "on Duty" offense? No, he was given a reprimand, allowed to volunteer for a one grade reduction to GS-13, and transferred to a position of lesser responsibility. (See pages 4-9, 15-16, and 44-45, DX 20).

Case No. 4: This involves another Civil Service employee, the Deputy Comptroller, Berlin Command, Mr. Maresco. This individual in a position almost identical to that of plaintiff, admitted an "on Duty" offense which not only involved fraud against the U.S. Government, but a serious violation of U.S. Customs Regulations. Mr. Maresco fraudulently shipped to the United States from Berlin, on the travel orders of a military member of Berlin Command, personal property purporting to be the property of this Major, knowing full well that it was his property. Further, Mr. Maresco caused the Army Engineers to build a special crate for the shipment of this property. Despite these very serious offenses, committed "on Duty", with premeditation, and despite the position of responsibility he held, Mr. Maresco was not separated, but was given a reprimand and a short suspension.

Colonel Larsen, the appointing authority, Major General Kyser, and Brigadier General Warner kept stressing that punishment of plaintiff must be severe, not because of the offense committed, but because of the position occupied. This is a concept contrary to the true precepts of U.S. justice and contrary to the Civil Service Commission and Department of the Army policy of "like punishment for like offenses", with no mention of the grade occupied by the offender. Where is this equality of punishment when:

A Contracting Officer, Major McBreen, signing contracts and obligating the government to pay millions of dollars annually, files a fraudulent travel claim and receives a reprimand, a fine of $300, and is permitted to retire, on a life time pension, and accept employment with one of the firms with whom he was contracting.

A Contracting Officer's Representative, Mr. Kammons, handling multi-million dollar contracts – falsified a travel claim – and received a two-day suspension.

A Civilian Personnel Officer, Mr. Rowe, administering the recruitment, hiring, grading and administration of approximately 20,000 civilian employees and thus the obligation of millions of dollars annually – falsified his qualification record for employment and promotion – and received a reprimand and was allowed to volunteer for a one grade reduction, from GS-14 to GS-13, with only a minimal cut in salary.

A Deputy Comptroller, Mr. Maresco, occupying a position of similar responsibility to that of plaintiff – fraudulently shipped personal property on the travel orders of a military member, violating customs regulations, as well, and received a reprimand and a short suspension.

Plaintiff, Mr. Rifkin, committed an "off duty or leave free status" offense, unrelated to the duties of his position, which was not infamous or notorious, and resulted in a no loss to the government, and despite being a disabled veteran with over 23 years honorable service – was separated.

Plaintiff agrees to the power of the appointing authority to remove for cause, but only when this will result in *fair and equal treatment*. Where was this policy when plaintiff's appeal was being reviewed? Each of the first three cases, discussed above, was brought to the attention of the purportedly "fair and impartial" Secretarial level review board. In the case of Major McBreen, because of information withheld or erroneously reported, they concluded that:

> "The attorney's representations to the effect that appelant had no opportunity to question the Commanding Officer, USAPCF concerning the affair of

> Major "B" and was thus deprived of his right to cross-examine witnesses against him are deemed untimely and without merit. The board did not consider the admitted infractions of appellant and Major "B" in the light of their respective positions of trust and dissimilarity circumstances to be of such comparable nature as to require similar penalties. The Board therefore found that such additional information concerning Major "B's" activities as might allegedly be developed during cross examination would not have provided a basis for change in the Board's earlier recommendation in the matter. Accordingly, lack of opportunity to cross-examine on this issue was not prejudicial to the appellant." (Paragraph 6b, Supplemental Report of the Employment Policy and Grievance Review Staff, Department of the Army, 17 November 1966. This document was never seen by plaintiff, until it was offered into evidence at the trial hearing, on 29 August 1974, as part of DX 32)

Review of paragraph 2b, above, establishes how wrong the decision by the Review Board was in this instance. The case of Mr. Kammons was also referred to this board and the record fails to disclose that they ever discussed or evaluated this case, or answered plaintiff on this question. When the case of Mr. Rowe was raised with this same board their answer was that since Mr. Rowe had never filed a grievance appeal with the Department of the Army there was no basis on which they could consider the equality or inequality of treatment between Mr. Rowe and plaintiff. This is a fair and impartial review?

3. Plaintiff has rights that are derived generally from Section 14 of the Veterans' Preference Act of 1944, 58 Stat.

Par. 390, as amended August 4, 1947, 61 Stat. Par. 723 5 U.S.C. Par. 863 (1964 ed.), the current revision of which appears in 5 U.S.C. Par. 7512. This provides that discharge and other adverse actions against preference eligible employees may not be taken except "for such cause as will promote the efficiency of the service."

That separation of plaintiff *did not* promote the efficiency of the service was established in the depositions admitted at the Trial Hearing, which stated in part:

> "To say that the dismissal of Rifkin enhanced the operation of the Agency or that it enured to the benefit of the service is a misstatement in military history. My opinion is that Mr. Rifkin was the most capable, loyal and industrious comptroller this agency had, including his successors up to the present time." (Mr. Louis L. Haupt, Asst. General Counsel, U.S. Army Procurement Agency)

"As one of the principal executives of that Agency, I had daily contact with Mr. Rifkin on both operational and policy matters. I believe it is worthy to note that no one assigned similar tasks after Mr. Rifkin's dismissal achieved a similar level of performance or effectiveness." and "Mr. Rifkin, in my opinion, possessed all of the qualifications and qualities to perform as a Comptroller at even a higher level than the position he held in the organization at the time of his dismissal. He was particularly well skilled in dealing with matters of budget and personnel which were essential during those very critical days of budget constraints and entrenchment, and had the ability to carry the organization through such very difficult times through

his skills and knowledge of how to cope with these severe limitations that were imposed on us." (Edward J. Bennett, Special Assistant to the Commander, U.S. Army Procurement Agency)

"Definitely not. Harold Rifkin conducted, as I said in my earlier statement, a shop with efficiency and capability, to the extent that there were great benefits from his service in the coordinating of the obligations of funds relating to all contracts. This was a tremendous job when you think in terms of comptroller serving all of Europe, as well as the entire military command in Germany. Immediately after his dismissal his good service was no longer there. There were various comptrollers that came in and out since his removal in 1965, but at no time have the comptroller activities reached the efficiency and cooperation and coordination that was available to the military, the procurement agency, and the civilians at the center. There was constant confusion and reports were late. Liquidations were not up-to-date. There was constant reshuffling of the activities of the comptroller due to the constant turnover of personnel and dissatisfaction in the shop. I can definitely state that his removal was without question a detriment to the Procurement Agency and the Federal service as a whole." (Peter Triveri, Supervisory Contract Specialist, U.S. Army Procurement Agency)

Nowhere in the Court's decision is the question of the removal of the plaintiff promoting the efficiency of the service addressed.

For the reasons hereinbefore submitted it is petitioned that appellant be granted the relief he seeks.

Respectfully submitted,

Harold F. Rifkin, *Pro se*
CMR Box 3787
APO New York, New York 09057

I hereby certify that I have this day made service upon the Solicitor General, Department of Justice, Washington, D.C. 20530 by mailing him a copy of this application at the United States Air Force Post Office at Frankfurt/M, Germany, APO New York 09057.

Harold S. Rifkin
Garten Strase 2b
6114 Gross Umstadt
Germany.

APPENDIX A

IN THE UNITED STATES SUPREME COURT

* * * * *

TIMELINESS POSITION

Plaintiff, who is not an attorney, acting Pro Se, without a copy of the rules of the U.S. Supreme Court, and convalescing from open heart surgery, attempted to file this petition for a Writ of Certiorari, with what he believed to be due diligence, and within the prescribed time limit. The Court of Claims Decision of April 14, 1976, which contrary to the Trial Judge's opinion of July 2, 1975, was unfavorable to plaintiff, was issued while plaintiff was undergoing tests for a heart condition at the U.S. Army Hospital, Landstuhl, Germany. This decision did not reach plaintiff until May 11, 1976.

Although ill, at that time, and preparing to leave for London, England for open heart surgery, to be performed in less than one week, and unable to check any legal references, plaintiff did prepare and mail on May 14, 1976 a Motion for Rehearing. This motion for a rehearing was denied by an order, signed by Judge Davis on June 25, 1976. Because of the double coronary artery bypass surgery performed on May 22, 1976, at the Harley Street Clinic, London, England by Donald Ross, F.R.C.S., and a period of convalescence in the hospital, at a London hotel under medical supervision, and at plaintiff's home in Germany, plaintiff did not actually receive this order until August 11, 1976. Plaintiff, believing that he could count the ninety day period for filing this petitioin as commencing to run from the date of actual receipt of the order, as he had done in the Court of Claims, was of the opinion that this period expired on November 8, 1976.

On November 5, 1976, an application for an extension of time (appendage 2), within which to file a petition for Writ of Certiorari, was filed with the Clerk of the U.S. Supreme Court, stating that plaintiff was still under a directed period of convalescence from heart surgery, during which only a gradual resumption of work would be attempted. Plaintiff, still not feeling mentally or physically up to performing and presenting a competent appeal, requested a sixty day extension of time, from November 8th, which would have been ninety days after plaintiff had received the June 25, 1976, order.

This application was returned to plaintiff, by letter from the Clerk of the Court, dated November 8, 1976, stating that the normal time for filing having passed, no request for extension of time could be accepted or granted. Plaintiff was further advised that he should file his petition for a Writ of Certiorari, and that the Clerk would submit it to the Court, with a comment on its untimeliness.

Appellant respectfully requests, for the reasons submitted, the Court to accept and consider this petition, solely on its merits, in the interests of justice and fair play.

Harold S. Rifkin

APPENDIX B

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

November 8, 1976

Mr. Harold S. Rifkin
CMR Box 3787
APO New York, New York 09057

Re: Harold S. Rifkin v. United States

Dear Mr. Rifkin:

I am returning your application for extension of time to you. This Court cannot grant an extension of time once the time for filing has expired.

If you still desire to file a petition for writ of certiorari or to docket an appeal, you may do so and your petition or appeal will be docketed and sent to Court with a notation as to its untimeliness.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By Francis J. Lorson

Francis J. Lorson
Deputy Clerk

th
Enc.

Appendix B Page 2

IN THE
SUPREME COURT OF THE UNITED STATES

* * * * *

United States Court of Claims
No. 437-70

This is an application for extension of time within which to file a petition for Writ of Certiorari.

The applicant is Mr. Harold S. Rifkin, hereinafter referred to as Appellant.

The Trial Judge of The Court of Claims filed his opinion on July 2, 1975. The opinion was favorable to the Appellant.

The Trial Judge's decision, however, was appealed by Defendant. The United States Court of Claims Appeals Court entered judgment on April 14, 1976. The judgment in this instance was unfavorable to Appellant.

Appellant's motion for rehearing to amend or alter the judgment of April 14, 1976 was denied by an order dated June 25, 1976 signed by Judge Oscar H. Davis.

The order denying Appellant's motion for rehearing was received by Appellant on 11 August 1976.

By letter dated September 7, 1976 the Defendant, acting through its attorney LeRoy Southmayd Jr., submitted to Appellant a stipulation for Entry of Judgment. The stipulation was not acceptable to Appellant. Appellant electing to appeal to the United States Supreme Court.

Reasons for application for extension of time to file a petition for Writ of Certiorari:

Petitioner was hospitalized at U.S. Army Hospital Landstuhl, Germany, from 11 to 15 April 1976 for a heart condition. It was determined that open heart surgery would be necessary and that such should be performed without delay.

Petitioner was operated on 22 May 1976, although preparations for such operation were started on 23 April 1976. Operation was performed, due to its urgency, at Harley Street Clinic, London, England. Petitioner was hospitalized in London from 19 May 1976 to 3 June 1976. Petitioner was then directed to remain in London, England, for a period of five weeks for medically supervised convalescence. On or about 8 July 1976 Appellant returned to Germany in a wheelchair. Appellant was in total convalescence for a period of three months from date of operation. On 22 August 1976 Appellant started a second three month convalescence period during which a gradual resumption of work would be attempted. Appellant still does not feel mentally or physically up to preparing and presenting a competent appeal.

To support his contention Appellant submits attached hereto Operation Report (A) and Convalescence Report (B).

CONCLUSION

As Appellant's recent efforts to obtain competent counsel to represent him before this Honorable Court were unsuccessful due to lack of required funds, he must therefore act per se as he did in lower courts. Therefore:

It is respectfully petitioned, for the facts hereinbefore mentioned, that, as the Appellant cannot reasonably be expected in his present condition to properly prepare and present a petition for Writ of Certiorari that he be granted a sixty day extension of time within which to file such petition. The sixty days to commence to run from November 8, 1976 which is ninety days after the day Appellant received the Court of Claims Order denying his motion for a rehearing, or from December 10, 1976 which is ninety days after Appellant received Defendant's stipulation for Entry of Judgment, whichever of these two starting dates is pertinent.

Respectfully submitted

/s/ Harold S. Rifkin
Harold R. Rifkin
CMR Box 3787
APO New York, New York 09057

2 enclosures

I hereby certify that I have this day made service upon the Solicitor General, Department of Justice, Washington, D.C. 20530 by mailing him a copy of this application at the United States Air Force Post Office at Frankfurt/M, Germany, APO New York 09057. 1 November 1976

/s/ Harold S. Rifkin
Harold S. Rifkin

APPENDIX C

In the United States Court of Claims

No. 437-70

(Decided April 14, 1976)

HAROLD S. RIFKIN v. THE UNITED STATES

Harold S. Rifkin, pro se.
LeRoy Southmayd, Jr., with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before DAVIS, SKELTON, and BENNETT, *Judges.*

OPINION

PER CURIAM: Plaintiff, while employed as a civilian at the United States Army Procurement Center, Frankfurt, Germany, was charged with the offense of "altering and using an official document to defraud the United States" and was subsequently removed from his position as comptroller, GS-12, Step 3, in 1965. Plaintiff, who appears *pro se*, sues for back pay and reinstatement from April 1965. Defendant urges that there is no merit to plaintiff's claim, and that suit not having been filed until December 8, 1970, in any event the claim is barred by the doctrine of laches.

Defendant's motion for summary judgment was denied by order dated April 27, 1973. The case was remanded to the trial judge for appropriate proceedings toward resolution of disputed factual issues, "in particular those relating to any possible *ex parte* evidence, any factors pertaining to plaintiff which might affect the application of the doctrine of laches to the case, and others."

After a trial, Trial Judge Miller concluded that (a) under the pertinent military regulations plaintiff had been wrongfully deprived of his pay from April 13, 1965 to August 30, 1965 (*i.e.* from the original date of his removal to the completion of his appeal to the major command in Europe); (b) the penalty of removal was, in all the circumstances, an abuse of discretion and too harsh; (c) the appropriate penalty would be no more than suspension without pay for a period of approximately two years and six months (from June 8, 1968 to December 8, 1970); (d) the bar of laches should not preclude the entire suit but only foreclose recovery for the same period (June 8, 1968 to December 8, 1970); (e) plaintiff is entitled to be restored to his former position (or to an equivalent position in Grade GS–12); and (f) plaintiff is entitled to back pay from April 13, 1965 (his initial removal date) to the date of his restoration to duty, with the exception of the two and one-half year period from June 8, 1968 to December 8, 1970.

We agree with the first of these holdings but disagree with the second and the third. Our determination, contrary to that of the trial judge, is that removal was not an abuse of discretion. This conclusion disposes of the demand for restoration and the bulk of the claim for back pay, and makes it unnecessary for us to consider the defense of laches as it applies to that major portion of the back-pay claim which we deny on the merits.

In Parts I and II of this opinion we adopt the trial judge's statement of the facts and his discussion of the minor back-pay claim for the period from April 13, 1965, to August 30, 1965. In Part III we set forth our own evaluation of the severity of the penalty, in the light of all the circumstances, and of the argument that the Army abused its discretion in separating plaintiff. Next, in Part IV, we adopt and supplement the trial judge's discussion of the alleged procedural errors with respect to *ex parte* presentations. Part V concludes with our own short analysis of why laches does not bar the lesser pay-claim for April–August 1965.[1]

[1] This opinion embodies the necessary findings of fact.

I

It was the responsibility of the Procurement Center's comptroller's office, which plaintiff headed, to maintain its financial records. All requests for payment of obligations, totaling some $400 million annually, had to be certified by the comptroller's office. Plaintiff supervised some 40 clerks whose function it was to match requests with supporting documents and balances of funds on account, certify that the obligations could be paid, and then record the expenditures. The comptroller's office itself kept no cash and could only certify for payment requests accompanied by the appropriate documents, *e.g.*, contract, travel order, delivery receipt, none of which were within the purview of the comptroller's office.

Plaintiff, who had an aggregate of more than 23 years of satisfactory Federal service, began his service in the Procurement Center in 1958 as an accountant, GS–10. Throughout his employment there to 1965 plaintiff received consistently high performance ratings, and was rapidly promoted. In 1963 he became comptroller, GS–12. He earned a reputation for outstanding technical competence and proficient, innovative work. Twice, in 1960 and 1962, he received sustained superior performance awards. On December 28, 1964, just a few days prior to the incident causing his removal, plaintiff for the second straight year was recommended by his superiors for promotion to a GS–13 grade.

The facts surrounding the incident leading to the removal action are mostly not in dispute. Civilian employees of the Department of the Army hired in the United States and stationed in Germany were entitled and encouraged to take biennial home leave at Government expense. The travel authorization for plaintiff and his wife for purposes of such leave was dated December 18, 1964. It authorized their travel outside the United States by Government air, rail and water transportation, or by his own vehicle, and within the United States by first-class air, air tourist (if available) and rail transportation or by his own vehicle. It also listed their port of embarkation to be Bremerhaven, their date to

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report there, January 5, 1965, and the name of the vessel on which he was booked, *SS United States*. After a month's vacation in Beverly Hills, California, on February 8, 1965, plaintiff was scheduled to proceed to Rock Island, Illinois, to attend a 2-week Army seminar on top management and on February 24, 1965, to be available for return travel. The travel authority made no arrangements for return booking.

Travel accommodations for Department of Defense personnel were handled by the Military Sea Transportation Service (MSTS). The names, status, and family compositions of those scheduled to travel were supplied by the sponsoring agency and they were then assigned accommodations by the MSTS on the basis of rank or GS level. There was no fixed cutoff between those entitled to first-class and those entitled to cabin-class accommodations, either in any regulation or in actual practice. It depended on the blocks of space procured by MSTS for a particular voyage and the actual mix of the authorized travelers. On one sailing all GS–13's or equivalent might be in cabin class, on another the GS–12's might be in first class. An effort was made, however, to avoid aggravated invidious treatment by placing all those in the same grade in similar accommodations. On the January 5, 1965 voyage of *SS United States* GS–13's were placed in first class, GS–12's and below in cabin class. Plaintiff, who had been listed with the MSTS as a GS–12, was therefore assigned cabin accommodations.

After the ship departed Bremerhaven, plaintiff presented to the assistant purser of the ship additional copies of his travel orders, which he had previously altered so as to indicate falsely that his grade was a GS–13, and sought reassignment to first-class accommodations. At Southampton the purser called the "mistake" to the attention of the MSTS representative and the latter obtained first-class accommodations for plaintiff and his wife at an additional cost to the Government of $351.

Shortly thereafter, Col. John T. McKee, Commanding Officer of the Army Procurement Center, received a complaint from the Army Transportation Command that the Procurement Center had furnished erroneous travel orders designating plaintiff at a level inferior to his actual rank.

At Colonel McKee's direction an investigation was conducted by the Criminal Investigation Detachment (CID). The CID eventually located and interviewed plaintiff at his hotel in California, and he admitted the alteration and misuse of the altered travel order. Colonel McKee ordered plaintiff to return to Frankfurt at the end of his leave without attending the seminar, and plaintiff departed from New York on February 8, 1965.

Colonel McKee retired from the Army on March 1, 1965. Based on the information received by that time, Colonel McKee had decided to proceed with action to remove plaintiff from the Service. Prior to his departure he discussed this fully with his successor, Col. George E. Larsen. On March 2, 1965, Colonel Larsen sent plaintiff an "Advance Notice of Proposed Removal," effective April 5, 1965, charging him—

> with altering and using an official document to defraud the United States Government * * * [by] chang[ing] the grade and salary from GS–12, $10,960 to GS–13, $12,075 on a copy of [his] travel orders * * * [by presenting it to] an assistant purser on the S.S. United States * * * for fraudulent purposes * * * to change [his] accommodations [sic] [to those] based on the grade GS–13 indicated thereon. * * *

As authorized by the notice, at plaintiff's request, an informal meeting was held with Colonel Larsen on March 10, 1965, for presentation of plaintiff's side of the case. Also present were plaintiff's attorney and Maj. Eugene Murphy, Colonel Larsen's Procurement Judge Advocate. Plaintiff admitted the alteration but claimed in mitigation his actions had been motivated by his depression over the fact that his position was deserving of a higher grade (to which he had been twice recommended) and by the fact that many of his friends mistakenly thought he held a higher grade. Thus he decided to maintain that posture in their eyes. He claimed he had no intention to defraud the United States, but had presented the altered orders to the purser in a moment of foolishness and "poor judgment," and under the influence of medically prescribed tranquilizing drugs. Plaintiff stated that he was "very, very sorry" and that he wanted to reimburse the Government for the cost involved, which he sub-

sequently did. Plaintiff also detailed his long, distinguished, and theretofore unblemished, record in the military and civil service and pleaded that he could continue to render competent and trustworthy service. The formal written reply to the proposed removal submitted by plaintiff on April 2, 1965, embodied these same represenations.

On April 7, 1965, Colonel Larsen advised plaintiff of his removal on the ground that there was substantial evidence to support the charges of—

> altering and using an official document to defraud the US Government * * *. In view of your military service in the Finance Corps, including approximately seven years as a Lieutenant, your approximately two years as a Supervisory Accountant with the US Army Audit Agency, and over six years with the US Army Procurement Center Frankfurt as an Accounting Officer, Supervisory Accountant, and Comptroller, you were especially well qualified to be aware of the gravity and implications of your actions. * * *

As entitled by Department of the Army Civilian Personnel Regulations, plaintiff appealed his removal to the major commander, the Commander in Chief, United States Army, Europe (CINC USAREUR). Incident to such an appeal plaintiff was entitled to an evidentiary adversary type hearing before a grievance examiner, who was to make findings and conclusions for submission to the Commander in Chief. This was held on May 24, 1965.

At the administrative hearing Colonel Larsen justified his ouster of the plaintiff on the ground that Mr. Rifkin's position required him to sign documents authorizing the outlay of huge amounts of Federal funds, and that such authority required a man whose trustworthiness and absolute honesty in all matters is beyond all doubt in the minds of both his superiors and subordinates, whereas plaintiff's conduct had permanently impaired that trust. The grievance examiner found that there was no question as to the objective facts of plaintiff's conduct, but that the maximum penalty, which under the regulations could have ranged from a 5-day suspension to removal from the Federal Service, was too severe for the offense.

She was of the view that inadequate consideration had been given to plaintiff's prior record of more than 20 years

of exemplary Federal, military and civilian, service and that his one fall from grace was not in the course of his regular duties and did not show that he had or would betray a trust involved in such duties. With respect to the commanding officer's finding that Rifkin had intended to defraud the Government, she found more persuasive the statements of two of his co-workers that his misdeed was the product of personality traits which placed undue emphasis upon recognition of his prestige and importance, rather than any intent to defraud. Moreover, she found that "there is no regulation which states that Mr. Rifkin was *not*, even as a GS 12, precluded from first class accomodations [sic]", and that there was a question whether the Government had suffered any loss and whether the loss would not have been considered an acceptable condition on another sailing date.

The grievance examiner concluded that the penalty of removal was too severe under the circumstances of this case because (1) while plaintiff did use an official document to defraud the Government, there was no evidence that at the time of alteration he intended to so defraud: (2) he had a long career of faithful and outstanding service; and (3) he could still render trustworthy and effective service in another position. Accordingly the examiner recommended that plaintiff be transferred to another organization at a different location, suspended with loss of pay for up to 6 months, reduced to a lower grade and position in which he would have no responsibility for disbursing funds and/or changed to a nonsupervisory position.

As allowed in the Department of the Army Civilian Personnel Regulations, the Commander in Chief, Europe, referred the recommendations of the grievance examiner to an Employee Appeals Review Board, at his headquarters, consisting in this instance of two army officers and one civilian employee. In July 1965, the board found that "the charge of altering and using an official document to defraud the United States Government is supported," that no relief should be granted due to the seriousness of the act and the comparative possible sentences if found guilty in a civilian or military court, and that accordingly Mr. Rifkin's appeal should be denied and his removal from the Federal Service be finalized for the good of the Federal Service.

On August 30, 1965, the Commander in Chief, Europe notified plaintiff that the appeal record "clearly supports the charge that you did alter and use an official document to defraud the United States Government" and that his removal would promote the efficiency of the Federal Service. Therefore, he would not set aside or modify Colonel Larsen's decision. He also advised plaintiff of his right to seek review by either the Secretary of the Army or the Civil Service Commission, but not by both. (Civilian Personnel Regulation S1.2-6*a*.(2)(*a*)(i) (Change 6, Feb 6, 1964).)

Plaintiff elected to appeal to the Secretary of the Army. In addition to challenging the penalty of removal as grossly excessive and not warranted, plaintiff raised the issue of discriminatory treatment of civilian personnel vis-à-vis military personnel by comparing his situation to that of a military officer with the Procurement Agency who had received substantially lighter punishment for an allegedly similar offense. After consideration of further information about this incident supplied by Headquarters, United States Army, Europe (USAREUR), at the Secretary's request, the Employment Policy and Grievance Review Board stated that "the charge of altering and using an official document to defraud the United States Government was supported by substantial evidence and warrants the action taken." The board had also directed an inquiry to Headquarters, USAREUR, regarding the severity of the penalty. The board noted its agreement with Headquarters, USAREUR's response to the effect that a person who had plaintiff's responsibilities for certification and financial management of procurement funds must exemplify the highest standards of personal integrity and "'Mr. Rifkin's deliberate action to defraud the United States necessitated his removal'". On April 27, 1966, the Secretary of the Army sustained the removal as "appropriate in light of the nature of your offenses and your position of trust" and not an abuse of administrative discretion.

On June 3, 1966, the president of the American Federation of Government Employees wrote to the director of Civilian Personnel of the Army concerning the possible use of *ex parte* evidence in plaintiff's case. On July 28, 1966, the department supplied plaintiff copies of three documents so

used: the letter dated July 2, 1965, from the Commanding General, Communications Zone Europe, to Commander in Chief, United States Army, Europe; the memorandum to the Deputy Chief of Staff at CINC USAREUR from the Appeals Review Board, dated July 27, 1965, setting forth its recommendations; and the comments on plaintiff's appellate brief that were furnished the Secretary of the Army by the Commander in Chief, United States Army, Europe, on March 2, 1966. Plaintiff's attorney was advised that he could submit any comments on the documents, and, under date of August 22, 1966, he did so. His comments were forwarded to the Office of the Under Secretary, Department of the Army, for consideration. Such submission together with the documents were considered by the Army, and in a supplemental report the Employment Policy and Grievance Review Board found no facts warranting modification of its original decision. On November 25, 1966, the Deputy Under Secretary of the Army advised plaintiff that it had been determined that there was no reason for modifying the department's decision of April 27, 1966.

On June 2, 1966, plaintiff appealed to the Civil Service Commission. On June 29, 1966, the Appeals Examining Office disallowed the appeal on grounds that plaintiff had exhausted his appellate rights by filing an appeal with the Secretary of the Army. Plaintiff's appeal of this decision to the Commission's Board of Appeals and Review was also denied on September 8, 1966. Meanwhile during 1966, plaintiff's wife wrote to the President of the United States complaining that her husband had been victim of religious discrimination. The matter was referred to the Equal Employment Opportunity Officer of the Army who determined that the appeal had not been filed within the statutory period and therefore could not be considered. This decision was then appealed by plaintiff to the Civil Service Commission which sustained the Army's decision, most recently on April 13, 1967. Plaintiff's further efforts in 1969 to have the Army change Standard Form 50 issued him at the time of his removal, which stated "Employee altered and used an official document to defraud the United States Government," to omit any reference to the word fraud, were also fruitless. Suit was filed in this court on December 8, 1970.

203-706—76——2

Following his removal, plaintiff continued to reside in Germany. Eventually, in 1970, he obtained a job in the United States Army Commissary as a sales clerk, GS–3, Step 1, at an annual salary of $5,212. By August 1974 he had been promoted to supervisory supply clerk, GS–5, Step 10, earning $10,467.

II

Plaintiff claims that regardless of the correctness of his discharge he was wrongfully deprived of his pay for the period from April 13, 1965 (the initial date of the determination to remove him) to August 30, 1965 (when the major command confirmed his removal). The essence of his claim is that by regulation an oversea employee of the Army, recruited in the United States, is entitled to remain in duty status until the completion of his appeal to the major command.

The Civilian Personnel Regulations provide in pertinent part (CPR E2.5 (June 1962)):

SPECIAL PROVISIONS FOR OVERSEA EMPLOYEES

5–8. In processing an action under CPR S1 discharging for cause a United States citizen employee serving overseas who is eligible for return transportation at Government expense, or, who is ineligible for such transportation but who cannot remain in the oversea area after separation because of immigration requirements and/or agreements requiring repatriation to the country of residence, the special provisions set forth below will be applicable. These provisions do *not* apply to separation of an individual serving a probationary or trial period.

* * * * *

c. If the employee files an appeal and requests authority to remain in the command, the installation will extend the notice period and inform the employee that he will be retained at the installation in a duty status pending the hearing and final disposition of the appeal at the major command level. Should the reasons for the removal action preclude retaining him on duty, he will be retained at the installation but suspended without pay. The suspension must be processed under CPR S1 as a separate personnel action. The employee may also be permitted to remain at the installation in annual leave

or leave without pay status *provided the submission of a written request for such leave is a completely voluntary action on the part of the employee.* Enforced annual leave will not be directed by the installation for the purpose of removing the employee from a duty status. [Emphasis in original.]

It is clear from the record that plaintiff's waiver of duty status was not "a completely voluntary action" within the meaning of the regulation and plaintiff did not waive duty status pending resolution of his appeal. Prior to the April 9, 1965 meeting with plaintiff, Colonel Larsen had been instructed by his judge advocate, Major Murphy, and the civilian personnel officer, Mr. Rowe, that plaintiff was likely to request to remain in duty status pending his appeal, but that plaintiff did not qualify under the regulation. Their rationale was that plaintiff, having just used his entitlement to travel at Government expense by means of a round trip to the United States and not yet having completed a new tour of duty, was not "eligible for return transportation at Government expense" and therefore not within the scope of the Special Provisions.[2] At the meeting plaintiff indicated that he did intend to request duty status and that the letter of appeal he had prepared so indicated. Colonel Larsen told plaintiff that the letter was unacceptable and instructed plaintiff to redraft the letter requesting annual leave or leave without pay. Despite their objections, plaintiff and his counsel submitted a revised letter on April 9, 1965, which complied with that direction. By letter of April 12, 1965, Colonel Larsen amended his original decision to permit plaintiff to utilize his annual leave and then continue in leave without pay status. The decision stated:

> 3. * * * However, in order to minimize personal hardship to you and your family during the period of appeal, paragraph 1, reference 1c is amended to delete 12 April 1965 as the effective date of your removal. I find no justifiable basis for continuing you in a duty status pending the receipt of a decision on your appeal. I do approve your request for annual leave and leave without pay during this period beginning at 0730, 13 April 1965. * * *

[2] There is no contention that plaintiff qualified as one who could not remain overseas because of immigration or repatriation requirements.

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This enabled plaintiff to retain commissary, post exchange and other similar privileges through September 17, 1965.

Defendant's position is that plaintiff is not entitled to the benefit of the Special Provisions for Oversea Employees because, having just taken advantage of his biennial reemployment leave and round-trip transportation to the United States, under the Civilian Travel Regulations he became obligated to serve an additional 2 years before becoming "eligible for return transportation at Government expense" within the meaning of the special provision.

The Civilian Travel Regulations, CPR T3, (June 1961) provide (para. 1–6) that each new or current employee selected for assignment to an oversea official duty station is required to sign a transportation agreement prescribing a stipulated period of oversea duty before transportation at Government expense to the oversea area may be authorized and that he has a vested right to return transportation only upon completion of the prescribed period of service (here 2 years). The standard transportation agreement, which is attached to the regulations, provides for round-trip transportation of such employees, their immediate families, their household goods and personal effects at Government expense, but employees are not eligible for the return portion if they separate voluntarily or are separated involuntarily because of misconduct prior to completion of the agreed period. Paragraph 2–11 of the regulations allows and encourages employees, upon completion of the minimum period of service and execution of an agreement for a new tour of duty, to utilize this transportation for "reemployment leave" in the United States. The prescribed tour for the new transportation agreement then begins as of the date the employee returns to work. (Para. 2–11.*a*.)

The travel regulations set forth qualifications for return "transportation entitlement" from an oversea duty station to place of residence. (CPR T3.2–4.*c*. (June 1961).) In addition to completion of the agreed minimum period of service, these include the requirements that the employee has been reassigned or transferred from, or recruited in the United States; or, if he is a United States citizen hired locally, that he maintain bona fide residence in the United States. For purposes of such entitlement an individual is considered to

have prima facie residence in the United States if his status at the time of employment was that of student formally enrolled in a recognized institution of learning, traveler absent from the United States for not more than 6 months, member of the Armed Forces separated locally for the express purpose of accepting Federal employment, or employee of another Federal agency, instrumentality, Government contractor, international organization, or other activity operating in support of the United States or its personnel, if the individual was recruited in the United States under conditions of employment which provided for return transportation.

It is apparent that even for purposes of the travel regulations the meaning of a term such as "eligible for return transportation at Government expense" would depend upon the context in which the phrase appeared. For example, paragraph 1–6 provides that upon completion of the prescribed period of service the otherwise qualified employee has a "vested right" to return transportation at Government expense. The implication is that completion of the minimum period of service results in "vesting" and that prior to that time one is eligible if he eventually meets the other conditions for return transportation at Government expense. Similarly, paragraph 2–4.*c*. provides that to avoid misunderstanding and disagreement at a later date as to meeting the conditions, "*entitlement to return transportation will be determined at time of appointment and recorded through execution of* [*the*] *transportation agreement*" (emphasis in original). It is obvious that in such context "entitlement" means qualified other than by completion of the service period. "Eligible" would certainly appear to mean less than "vested" or "entitled".

It is concluded that in the context of the Grievance and Appeal Procedures (CPR E2) Special Provisions for Oversea Employees (section 5–8), the provision for allowing employees "eligible for return transportation" who are appealing removal actions to remain in duty status pending disposition of their appeals is not limited to the time after they have completed their periods of service.

It is important to note that the special provision covers not only employees eligible for return transportation but two other groups, to wit:

> [A] United States citizen employee serving overseas who is eligible for return transportation at Government expense, or, who is ineligible for such transportation but who cannot remain in the oversea area after separation because of immigration requirements and/or agreements requiring repatriation to the country of residence * * *.

The regulations contain no explanation as to the reason why the three categories of employees are to be retained in duty status pending appeal of their discharge for cause, or as to what common purpose is served by similar treatment for those eligible for return transportation, those who cannot remain in the area because of immigration restrictions, and those who must be repatriated. Nor does defendant suggest any common denominator. Absent any other interpretative aid, it is inferred that the purpose of the Special Provisions for Oversea Employees is to insure that a United States citizen who would be unlikely to be able to find foreign employment because of cultural or legal impediments will not be effectively deterred or hampered in the exercise of his right to appeal his discharge to the major command level by his inability to support himself in the foreign area while the appeal is pending.

In the context of the Grievance and Appeal Procedure a "citizen employee * * * who is eligible for return transportation at Government expense" is one who is a resident of or is reassigned or transferred from or recruited in the United States, or if hired locally maintains bona fide residence in the United States and has not been absent for more than 6 months, or was a student or member of the Armed Forces or employee of another Federal or similar agency who transferred for the purposes of obtaining the particular employment, i.e., all those covered by a transportation agreement, whether or not the right to the return portion has matured. A regulation that an employee who meets the above requirements is not eligible to remain in duty status pending the appeal from his removal because he does not have 2 years of service since his last home leave, while at the same time one who does not meet such requirements but is barred from remaining in the area by immigration restrictions or international repatriation agreement is entitled to duty status after only one day's employment would create a discrimination without discernible purpose. Under defendant's construction, the only persons who would ever be "eligible for return transportation," and therefore entitled to remain in duty status, would be those who had completed their minimum service but had not yet exercised their right to reemployment leave. This would mean that an employee could come within the protection of the special provisions only once every 2 years, and then remain eligible for this protection for probably only a few months at most. Such an anomalous construction would appear to defeat the purpose of the special provisions.

A second factor that makes the Government's interpretation untenable is that the same prerequisite, *i.e.*, "eligible for return transportation at Government expense," applies to retention in leave status, which Colonel Larsen granted without hesitation. If plaintiff was not within the class of persons to whom the special provisions applied, then obviously he could not be afforded *any* of the protections or rights created therein. The introduction to the special provisions identifies those employees for whom a discharge action must be processed in accordance with the special procedures. Paragrapl. *c* begins by providing that an employee requesting to remain in the command "will be retained at the installation in a duty status pending the hearing and final disposition of the appeal at the major command level". If it is inappropriate to keep him in duty status, a separate suspension action must be processed with appropriate notice and hearing procedures. If the employee abandons his right to duty status and *voluntarily* requests annual or without pay leave status then this may be granted. The regulations emphasize the need for voluntariness by italicizing the phrase "*provided the submission of a written request for such leave is a completely voluntary action on the part of the employee.*" The emphasis is reinforced by the next sentence which warns that "[e]nforced annual leave will not be directed by the installation for the purpose of removing the employee from a duty status." It would seem, therefore, that by telling plaintiff he was not eligible for duty status yet requiring him to rewrite his request for annual and without pay status, Colonel Larsen was able to obtain pro forma compliance with the requirement

of voluntariness and immediately remove plaintiff from the command. Plaintiff should now be compensated for the period he was wrongfully deprived of duty status.

III

There is no dispute that the acts charged were in fact done. Plaintiff's principal plea is that the penalty of removal was too harsh in the light of both the nature of his single transgression and his long history of unblemished and superior Government service.

Recent decisions of this court have outlined the limited review functions of this court with respect to penalties. In *Grover* v. *United States*, 200 Ct. Cl. 337, 353 (1973) the court asserted:

> * * * This court has stated on many occasions that the measure of the penalty is within the discretion of the agency. *Birnholz* v. *United States*, 199 Ct. Cl. 532 (1972); *Heffron* v. *United States*, 186 Ct. Cl. 474, 484, 405 F. 2d 1307, 1312 (1969); *Liotta* v. *United States*, 174 Ct. Cl. 91, 96 (1966); *De Nigris* v. *United States*, 169 Ct. Cl. 619, 625 (1965). There are, of course, exceptions to this general rule where it can be shown that the decision made by the agency was the product of abused discretion. The test for the abuse of discretion requires a showing by the plaintiff that the penalty is so harsh that there is "an inherent disproportion between offense and punishment." *Heffron* v. *United States*, *supra*, 186 Ct. Cl. at 485, 405 F. 2d at 1312–13; *Clark* v. *United States*, 162 Ct. Cl. 477, 484 (1963).

However, when such abuse of discretion has occurred, the the court has not hestiated to set aside penalties, whether or not they have been within the range of permissible alternatives. *Clark* v. *United States*, 162 Ct. Cl. 477, 482–86 (1963); *Jacobowitz* v. *United States*, 191 Ct. Cl. 444, 458–59, 424 F. 2d 555, 563 (1970); *Cuiffo* v. *United States*, 131 Ct. Cl. 60, 68–70, 137 F. Supp. 944, 949–50 (1955); *Power* v. *United States*, Ct. Cl. No. 439–74, decided March 17, 1976; *cf. Daub* v. *United States*, 154 Ct. Cl. 434, 292 F. 2d 895 (1961).

Civilian Personnel Regulation C2 (Feb. 1964) provides that the severity of disciplinary action is left to the discretion of appropriate officials of the employing activity (para.

4–2.*a*.), but it does set out a list of suggested penalties. For the applicable offense, "False statements, misrepresentation, or fraud in application blank or other official records submitted to the Department of the Army", the suggested range of penalties for a first offense is "5- to 10-day suspension, or removal." (CPR C2, app. B, Table I (Feb. 1964).)

The trial judge concluded that, although the sanction of removal fell within the range of authorized penalties, the Department of the Army had abused its discretion in this instance. His main ground for this result was that the Department was under the misapprehension that, as a GS–12, Rifkin would never have been entitled to first-class carriage—that the line was always drawn between GS–12's and GS–13's—and therefore that he deliberately intended to and did defraud the United States by changing his travel orders to show that he was a GS–13. The trial judge said: "The undisputed testimony was that there was no fixed dividing line between grades entitled to first class and grades entitled only to lesser accommodations. On some sailings GS–12's were assigned first-class accommodations. It all depended on the blocks and mixes of accommodations booked in advance for a particular sailing by the MSTS officer in charge as compared to the actual demand therefor. Thus, it appears that assignment of preferred accommodations in order of rank or grade was merely an orderly method of allocation to suit the requirements of a particular day's reservations. Accordingly, while plaintiff's use of an altered travel authorization falsifying his grade was unquestionably an improper act designed to obtain an unwarranted advantage over others, it does not necessarily follow, as Colonel Larsen assumed and his superiors accepted, that it was designed to or in fact did defraud the United States out of money or moneys worth to which under no circumstances was the plaintiff entitled."

In addition the trial judge relied (as showing abuse of discretion) on (a) testimony by officials at the immediate level of command that plaintiff's motivation was the higher prestige of being considered and treated as a GS–13, not the desire to defraud the United States out of the $351 extra cost of first-class transportation on the vessel; (b) testimony that

these first-level officials deliberately put out of their minds, as inappropriate considerations, their personal evaluations of "intent or human frailties, sympathy, or compassion": and (c) the evidence that these same first-level officials mistakenly thought that they had a choice only between a minimal punishment (such as suspension for no more than 30 days) and the ultimate sanction of removal.

After setting aside, on these grounds, the penalty of removal imposed by the Department, the trial judge held, "[o]n an overall view of the evidence in the record and in light of the permanent adverse effect that plaintiff's single transgression has already had on what was up to then a promising career," that a suspension without pay in excess of 2½ years would be unduly harsh and an abuse of discretion.

We do not agree with this evaluation and analysis and conclude, on the contrary, that the record does not show an abuse of discretion by the Department of the Army.

In the first place we think the trial judge's approach slights the cardinal fact that the ultimate decision was made by the office of the Secretary of the Army. It is that decision we are reviewing, not the first or second level determinations made in Europe. And there is no convincing evidence that the Secretarial level was under the same misapprehensions as the first-level officers who testified at the trial and on whose evidence the trial judge rests so heavily. The grievance examiner had made all the points the trial judge now makes and her recommendation was forwarded up the line. Moreover, in the course of appealing the first-level decision plaintiff's counsel hammered [3] at his contention that no fraud had been committed against the United States and that there was no rigid classification putting all GS–12's in cabin class. That the departmental Employment Policy and Grievance Review Board considered all aspects of the case is also suggested by the fact that on its own initiative it specifically asked the European command for "a comprehensive report with respect to the bases for the first level review decision, consideration given to assessment of lesser penalty, equity of deci-

[3] Especially at the grievance hearing and in his brief which was forwarded to the Secretary of the Army.

sion in appellant's case when compared to certain 'similar' cases involving military personnel, and to the activity commander's intention to replace appellant with a military officer." [4] The Board came to its first decision only after receiving this report from Europe. After its attention was called to the *ex parte* communications discussed in Part IV *infra*, the Board reopened the proceedings to allow plaintiff's counsel to comment on the hitherto *ex parte* communications and then reaffirmed its conclusion. Finally, the Board devoted a substantial part of its initial report to the aptness of the penalty and in that connection considered (and disagreed with) the grievance examiner's recommendation. All in all, we cannot say that at the Secretarial level—whatever may be said of the first-level decision—the Department of the Army was under a misapprehension as to the pertinent facts or as to its full discretion and powers with respect to the scope of the penalty. That subject appears to have been given ample and careful consideration in Washington.

Second, it was not wrong for the Army to characterize plaintiff's conduct as defrauding the United States. The fact is that on the particular voyage Mr. Rifkin (as a GS–12) was not entitled to first-class accommodations. By showing his travel authorization, which he had deliberately altered to state that he was a GS–13, he persuaded the purser to give him a first-class cabin on that trip. This cost the Government an additional $351. It is irrelevant that on some other crossing he might, as a GS–12, have been entitled to a first-class room. On the particular trip in question he was not so entitled and he nevertheless sought to obtain that advantage by exhibiting an altered copy of his travel orders. It cannot be gainsaid that on that specific trip plaintiff's actions cost the Federal Government an extra $351 which it would not have had to pay if he had not falsified his grade and which it was not required to pay under the cabin-demarcation pattern adopted for that voyage. Even in technical terms this was the misuse of an official document to defraud the United States. In more colloquial usage, allowable in civil adverse action proceedings, the United States is defrauded when an

[4] The quotation is from the first report of the Employment Policy and Grievance Review Board.

employee deliberately alters an official document so as to misrepresent its content for his own advantage. As we have said, there is no sufficient evidence that, when the case was decided at the Secretarial level, there was any misunderstanding by either side as to what was here involved in the concept of "defrauding the United States." Whether or not that terminology would be correct in a criminal information or indictment, we think that it was not inappropriate for this adverse action proceeding. That Mr. Rifkin's primary *motivation* may have been to enhance his own prestige rather than to cheat the Government does not serve to eliminate the element of fraud. He knew that he was a GS–12 not a GS–13; he deliberately altered the travel orders to show incorrectly that he was a GS–13; he deliberately exhibited the altered orders in order to obtain a substantial advantage aboard ship; he knew that his elevation to first-class would cost the Government more money; and he was ready to cause that result in order to obtain the prestige (and comfort) of being considered a GS–13. The psychological motivation for these intentional and deliberate acts of cheating does not take the offense out of the category of defrauding.

Third, unlike the trial judge we cannot bring ourselves to hold that, in all the circumstances, the penalty of removal was unduly harsh or an abuse of discretion. The improper act was a knowing, willful and deliberate one—a few days before his trip plaintiff had directed his secretary to alter the grade and salary designation on his travel authorization and then to have the changed document reproduced in several copies; after discussing with the purser aboard the ship the possibility of obtaining first-class accommodations and learning that GS–13's had such treatment he presented one of the altered copies to the purser in order to show that he was a GS–13; upon debarking at New York plaintiff made arrangements for his return travel, again submitting the altered travel form; but after the disclosure of the alteration he requested the return of the incorrect forms and the substitution of correct ones before the return trip. The Army could rightly hold on this record that plaintiff knew what he was doing and knew that it was wrong. And as the departmental board stressed, Mr. Rifkin was a relatively high-level

employee in a position of great trust. When such an employee deliberately changes an official document so as to make it falsely represent his status, in significant fashion, and then deliberately uses it so as to obtain a substantial advantage for himself, removal cannot be branded as disproportionate to the offense. *See Birnholz* v. *United States*, 199 Ct. Cl. 532 (1972); *Grover* v. *United States*, 200 Ct. Cl. 337, 353–354 (1973); *Hoover* v. *United States*, 206 Ct. Cl. 640, 648–49 513 F. 2d 603, 607–08 (1975).

It is not hypocrisy or lip-service to repeat that we are not allowed to substitute our judgment for that of the Army, that we can set aside the punishment only when we consider it an abuse of discretion or disproportionate to the offense. We cannot exercise clemency or give way to our sense of compassion in the same manner the employing agency can. This is another case in which a single misstep may ruin an employee's otherwise unblemished career but we do not feel that the offense is so slight or the punishment so disproportionately heavy that as judges we can intervene—whatever we might have or might not have done as administrators. The responsibility for discipline lies with management and in this instance, though the sanction may have been severe, management's discretion was not abused.

Fourth, the decisions in which we have set aside or reduced punishment, as unduly severe or disproportionate to the offense, are quite different from this. In *Clark* v. *United States*, 162 Ct. Cl. 477 (1963), the most serious offense was the occasional misuse of a Government-owned automobile by the employee's family for private shopping; removal was plainly too harsh for such minor misconduct. *Id.* at 483–84. In *Jacobowitz* v. *United States*, 191 Ct. Cl. 444, 424 F. 2d 555 (1970), the only surviving offense was failure to promptly process checks received from certain taxpayers. "This charge was minor in nature, was old, and plaintiff had already received a reprimand for it from his superior." *Id.* at 459, 424 F. 2d at 563. In addition, government counsel tacitly agreed at oral argument that the employee would not have been discharged under that count if the other more serious (but reversed) count were not in the case. *See id.* at 458, 424 F. 2d at 563. As its opinion demonstrates, our recent decision in

Power v. *United States*, Ct. Cl. No. 439-74, decided March 17, 1976, is likewise no precedent here: "Defendant failed to substantiate a serious charge of alteration of weight tickets, but continued to advocate dismissal based on two minor discrepancies. There is some doubt whether plaintiff actually filed *false* information, and there is even greater doubt that plaintiff submitted the *de minimis* claims *knowingly, intentionally* and with the purpose to defraud the Government. The year's delay in bringing about plaintiff's removal poses yet another question concerning the fairness of the overly harsh penalty." Slip op. at 8 (emphasis in the original text).

IV

The court's remand order of April 27, 1973, requested resolution of the issue with respect to the use of *ex parte* evidence against plaintiff. In *Camero* v. *United States*, 179 Ct. Cl. 520, 525–27, 375 F. 2d 777, 779–81 (1967) and *Jarett* v. *United States*, 195 Ct. Cl. 320, 330–32, 451 F. 2d 623, 628–29 (1971), the court held that the Government's *ex parte* communications concerning the merits of a case to those responsible for the decision in proceedings prescribed by regulations to be based on evidence and adversary in nature invalidated a decision adverse to a Government employee.

Plaintiff alleges the improper use of at least 12 *ex parte* documents during the administrative appellate proceedings without the knowledge of plaintiff or his counsel. Plaintiff, however, identifies only one document, Colonel Larsen's Memorandum for Record of May 20, 1965, sent to the Commanding Officer of the United States Army Communications Zone (COMZ) at Orleans. This document was not a communication to one having the responsibility for a decision in an adversary hearing on evidence; the purpose, as testified to by Colonel Larsen, was routine—to keep his own commander, General Kyser, informed on matters pending within the Procurement Agency command.

When the American Federation of Government Employees (AFGE) raised the *ex parte* issue with the Army, plaintiff's counsel was furnished three documents:

(1) The memorandum from the Employee Appeals Review Board to a Deputy Chief of Staff of the Commander in Chief, Europe, dated July 27, 1965, setting forth its recommendations with respect to plaintiff's appeal and the grievance examiner's report.

CPR E2.5–5.*a.* (Change 2, July 30, 1963) allows the major commander to "prescribe the methods and procedures" for review, on the merits, of the transcript of the grievance hearing and the examiner's report. Pursuant to this authority, an Employee Appeals Review Board was set up by CINC US AREUR to review the record and to make recommendations to him. It was not unreasonable for the Commander in Chief, Europe, to seek assistance from his staff, the members of which had not been involved in the case. The board made a complete review and report. This appears to be allowable under the regulations, and since the panel's review was not an adversary hearing it was not inherently unfair or prejudicial.

(2) The comments on plaintiff's appellate brief that were furnished the Secretary of the Army by the Commander in Chief, Europe, on March 2, 1966.

This was prepared pursuant to a request by the Secretary of the Army for further information concerning the issues raised in plaintiff's appellate brief to the Secretary. The request sought information with respect to: (a) basis for determination that removal rather than a lesser penalty was warranted, as recommended by examiner; (b) circumstances of the major "B" case, urged by plaintiff to show discriminatory treatment; and (c) intention of Colonel Larsen to fill the comptroller position with a military officer, also claimed by plaintiff.

With regard to an appeal to the Secretary of the Army from a major commander's decision, CPR E2.5–6.*a.*(1) (Change 2, July 30, 1963) provides:

> The employee's request for review will be added to the appeal record along with any comments the activity commander or major commander wish to make, and will be forwarded through channels to the Office, Secretary of the Army. * * *

Since the regulations providing for such appeal specifically contemplate "comments" by the activity and major commander, and are silent concerning making such comments available to an appellant, it appears that such documents were proper.

Moreover, since the delegate of the Secretary of the Army made both documents (1) and (2) available to plaintiff, gave plaintiff's counsel an opportunity to file a brief in response thereto and reconsidered his decision in the light of such brief, plaintiff has not been deprived of any rights granted by the regulations or which affect the basic fairness of the appeal proceeding.

(3) A July 2, 1965 letter from COMZ (Major General Kyser) to Commander in Chief, Europe.

Colonel Larsen had been keeping his immediate superior, Major General Kyser (COMZ), informed of his actions with respect to the Rifkin matter. After the grievance examiner's report was issued on July 2, 1965, General Kyser unilaterally wrote to the Commander in Chief, Europe, before whom plaintiff's appeal was pending, without furnishing a copy to plaintiff, urging that the recommendations of the grievance examiner not be followed and that the removal be sustained. He stated "[t]hat fraud against the United States was committed is adequately established"; the removal of an employee in a position of trust who has failed with respect to honesty and integrity is necessary to promote the efficiency of the service; "[t]he retention of an employee who is known to have committed a fraud against the United States" would unfavorably affect the morale, integrity and high standards of conduct of other employees; and plaintiff's fraudulent act could have been the basis of a prosecution which could have warranted a $10,000 fine and 5-years imprisonment.

General Kyser's letter is troublesome. It sought to influence the result of an adversary hearing required to be based on evidence by imposing his own conclusions in the appeal. Since it urged that the grievance examiner's recommendation for a punishment less severe than discharge not be followed because the plaintiff was guilty of a fraud against the United States which could even have warranted fine and imprisonment, it was certainly prejudicial to plaintiff. Major General Kyser was Colonel Larsen's direct superior and Colonel Larsen testified he conferred frequently with the general and his staff and kept them fully informed on everything he did in the Rifkin case, by memoranda, telephone and personally. Thus General Kyser's perspective and views

on the case were derived at least to some extent from Colonel Larsen, who was a party to the appeal. Colonel Larsen also testified that General Kyser was extremely concerned and upset about the Rifkin case and needed no convincing from him to write the letter to higher headquarters expressing his views about the case while the appeal was pending. The letter was in fact considered by the Commander in Chief, Europe, and his staff, in deciding the appeal, since it is expressly referred to in the memorandum dated 27 July 1965 from a panel set up by him, and is quoted in the letter to the Secretary of the Army dated 2 March 1966.

General Kyser's letter of July 2, 1965, states that it is in compliance with USAREUR Regulation 690–32, paragraph 6(b) (Feb. 8, 1965). It is not clear that such regulation, which is set out below,[5] does authorize an *ex parte* communication of the sort at issue here. In any event, if it did, a regional regulation which would authorize *ex parte* comments such as those of General Kyser's would be inconsistent with the entire adversary and evidentiary grievance procedure set up by the Army Civilian Personnel Regulations.

The trial judge concluded that General Kyser's letter was so prejudicial to plaintiff as to destroy his right to a fair and impartial hearing before the Commander in Chief, Europe. The trial judge then went on to say that it was unnecessary for him to decide, since he had already determined that the penalty should be vacated for other reasons, whether the reconsideration of its decision by the Office of the Secretary of the Army after plaintiff was allowed to respond to the three *ex parte* documents (including General Kyser's letter) was enough to cure the unfairness in the appeal to the major commander (Commander in Chief, Europe).

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[5] "6. *Processing Appeals From Adverse Actions.* a. An information copy of the Report of Inquiry and Grievance Record, which is forwarded directly to the Personnel and Administration Division, Headquarters USAREUR (CPR E2.5–4b), will be transmitted to the appropriate area commander. When the activity concerned reports directly to a staff division of Headquarters USAREUR, a copy of the Report of Inquiry and Grievance Record will be forwarded to the head of that staff division.

b. Immediately on receipt of the copy of the Report of Inquiry and Grievance Record by the commander indicated in a above, a qualified staff officer will be designated to analyze the appeal and recommend appropriate action."

Unlike the trial judge, we must directly face the impact in these proceedings of General Kyser's communication. We hold that any error at the European level in receiving and considering this letter *ex parte* was cured and rendered harmless at the level of the Secretary of the Army. There the document was made available (along with the other two) to plaintiff, and his counsel had the opportunity to comment on the letter; thereafter the Employment Policy and Grievance Review Board reconvened to reconsider the matter and the office of the Secretary reconfirmed its decision upholding the removal. It is the decision of the office of the Secretary that we are now reviewing—not the lower level decision of Colonel Larsen or of the Commander in Chief, Europe—and by the time the decision at the Secretarial level was finally made and issued there was no longer any *ex parte* influence on, or communication to, the deciding authority. Our ruling with respect to General Kyser's letter is the same as the holding of the trial judge (and ours) with respect to the other two *ex parte* documents. *See supra.*

V

We add a few words on laches. Because we sustain the defendant in removing plaintiff, we need not consider whether his broad claim would be barred in whole or in part by laches. We have, however, allowed him recovery of back pay for the early period from April 13, 1965 to August 30, 1965 (the period during which he was entitled to remain in duty status). *See* Part II, *supra.* Even if laches were to bar the rest of his claim, there is authority for carving out this early period. In *Chappelle* v. *United States*, 168 Ct. Cl. 362 (1964), although the suit was brought more than five and one-half years after accrual, the court struck down a defense of laches because the employee himself limited the claim to an early period for which he would have been entitled to recover had he brought suit more promptly. *See also Cason* v. *United States*, 200 Ct. Cl. 424, 471 F. 2d 1225 (1973). The same principle applies here with respect to the April 1965–August 1965 period for which back pay is awarded. Moreover, none of the factors which induce the application of laches is present for this part of the claim—the issue is purely

one of law and there is no problem of lost records, unavailable witnesses, or faded memories; nor would the Government have been saved a double salary for this period if plaintiff had sued earlier.

CONCLUSION OF LAW

Plaintiff is entitled to recover only his back pay for the period from April 13, 1965 to August 30, 1965, and the amount thereof will be determined in further proceedings under Rule 131(c). Plaintiff is not entitled to recover on any of the rest of his claim and that portion of the petition is dismissed.

APPENDIX D

IN THE UNITED STATES COURT OF CLAIMS
TRIAL DIVISION

No. 437-70
(Filed July 2, 1975)

HAROLD S. RIFKIN v. THE UNITED STATES

Harold S. Rifkin, plaintiff, *pro se*.

LeRoy *Southmayd, Jr.*, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

OPINION*

MILLER, *Trial Judge:* Plaintiff, while employed at the United States Army Procurement Center, Frankfurt, Germany, was charged with the offense of "altering and using an official document to defraud the United States" and was subsequently removed from his position as comptroller, GS-12, Step 3, on September 17, 1965. Plaintiff, who appears *pro se*, sues for back pay and reinstatement from April 12, 1965. Defendant urges that there is no merit to plaintiff's claim, and that suit not having been filed until December 8, 1970, in any event, the claim is barred by the doctrine of laches.

Defendant's motion for summary judgment was denied by order dated April 27, 1973. The case was remanded to the

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*The trial judge's recommended decision and conclusion of law are submitted in accordance with Rule 134(h).

trial judge for appropriate proceedings toward resolution of disputed factual issues, "in particular those relating to any possible *ex parte* evidence, any factors pertaining to plaintiff which might affect the application of the doctrine of laches to the case, and others."

It was the responsibility of the Procurement Center's comptroller's office, which plaintiff headed, to maintain its financial records. All requests for payment of obligations, totaling some $400 million annually, had to be certified by the comptroller's office. Plaintiff supervised some 40 clerks whose function it was to match requests with supporting documents and balances of funds on account, certify that the obligation could be paid, and then record the expenditure. The comptroller's office itself kept no cash and could only certify for payment requests accompanied with the appropriate documents, *e.g.*, contract, travel order, delivery receipt, none of which were within the purview of the comptroller's office.

Plaintiff who had an aggregate of more than 23 years of satisfactory Federal service, began his service in the Procurement Center in 1958 as an accountant, GS-10. Throughout his employment there to 1965 plaintiff received consistently high performance ratings, and was rapidly promoted. In 1963 he became comptroller, GS-12. He earned a reputation for outstanding technical competence and proficient, innovative work. Twice, in 1960 and 1962, he received sustained superior performance awards. On December 28, 1964, just a few days prior to the incident causing his removal, plaintiff for the second straight year was recommended by his superiors for promotion to a GS-13 grade.

The facts surrounding the incident leading to the removal action are mostly not in dispute. Civilian employees of

the Department of the Army hired in the United States and stationed in Germany were entitled and encouraged to take biennial home leave at Government expense. The travel authorization for plaintiff and his wife for purposes of such leave was dated December 18, 1965. It authorized their travel outside the United States by Government air, rail and water transportation, or by his own vehicle, and within the United States by first-class air, air tourist (if available) and rail transportation or by his own vehicle. It also listed their port of embarkation to be Bremerhaven, their date to report there, January 5, 1965, and the name of the vessel on which he was booked, SS United States. After a month's vacation in Beverly Hills, California, on February 8, 1965, plaintiff was scheduled to proceed to Rock Island, Illinois, to attend a 2-week Army seminar on top management and on February 24, 1965, to be available for return travel. The travel authority made no arrangements for return booking.

Travel accommodations for Department of Defense personnel were handled by the Military Sea Transportation Service (MSTS). The names, status, and family compositions of those scheduled to travel were supplied by the sponsoring agency and they were then assigned accommodations by the MSTS on the basis of rank or GS level. There was no fixed cut off between those entitled to first-class and those entitled to cabin-class accommodations, either in any regulation or in actual practice. It depended on the blocks of space procured by MSTS for a particular voyage and the actual mix of the authorized travelers. On one sailing all GS-13's or equivalent might be in cabin class, on another the GS-12's might be in first class. An effort was made, however, to avoid aggravated invidious treatment by placing all those in the same grade in similar accommo-

dations. On the January 5, 1965 voyage of SS United States GS-13's were placed in first class, GS-12's and below in cabin class. Plaintiff, who had been listed with the MSTS as a GS-12, was therefore assigned cabin accommodations.

After the ship departed Bremerhaven plaintiff presented to the assistant purser of the ship additional copies of his travel orders, which he had previously altered so as to indicate falsely that his grade was a GS-13, and sought reassignment to first-class accommodations. At Southampton the purser called the "mistake" to the attention of the MSTS representative and the latter obtained first-class accommodations for plaintiff and his wife at an additional cost to the Government of $351.

Shortly thereafter, Col. John T. McKee, Commanding Officer of the Army Procurement Center, received a complaint from the Army Transportation Command that the Procurement Center had furnished erroneous travel orders designating plaintiff at a level inferior to his actual rank. At Colonel McKee's direction an investigation was conducted by the Criminal Investigation Detachment (CID). The CID eventually located and interviewed plaintiff at his hotel in California, and he admitted the alteration and misuse of the altered travel order. Colonel McKee ordered plaintiff to return to Frankfurt at the end of his leave without attending the seminar, and plaintiff departed from New York on February 8, 1965.

Colonel McKee retired from the Army on March 1, 1965. Based on the information received by that time, Colonel McKee had decided to proceed with action to remove plaintiff from the Service. Prior to his departure he discussed this fully with his successor, Col. George E. Larsen. On March

2, 1965, Colonel Larsen sent plaintiff an "Advance Notice of Proposed Removal," effective April 5, 1965, charging him –

> with altering and using an official document to defraud the United States Government * * * [by] chang[ing] the grade and salary from GS-12, $10,960 to GS-13, $12,075 on a copy of [his] travel orders * * * [by presenting it to] an assistant purser on the S.S. United States * * * for fraudulent purposes * * * to change [his] accommodations [to those] based on the grade GS-13 indicated thereon. * * *

As authorized by the notice, at plaintiff's request, an informal meeting was held with Colonel Larsen on March 10, 1965, for presentation of plaintiff's side of the case. Also present were plaintiff's attorney and Maj. Eugene Murphy, Colonel Larsen's Procurement Judge Advocate. Plaintiff admitted the alteration but claimed in mitigation his actions had been motivated by his depression over the facts that his position was deserving of a higher grade (to which he had been twice recommended) and by the fact that many of his friends mistakenly thought he held a higher grade. Thus he decided to maintain that posture in their eyes. He claimed he had no intention to defraud the United States, but had presented the altered orders to the purser in a moment of foolishness and "poor judgment", and under the influence of medically prescribed tranquilizing drugs. Plaintiff stated that he was "very, very sorry" and that he wanted to reimburse the Government for the cost involved, which he subsequently did. Plaintiff also detailed his long, distinguished, and theretofore unblemished, record in the military and civil service and pleaded that he could continue to render

competent and trustworthy service. The formal written reply to the proposed removal submitted by plaintiff on April 2, 1965, embodied these same representations.

On April 7, 1965, Colonel Larsen advised plaintiff of his removal on the grounds that there was substantial evidence to support the charges of –

> altering and using an official document to defraud the US Government * * * . In view of your military service in the Finance Corps, including approximately seven years as a Lieutenant, your approximately two years as a Supervisory Accountant with the US Army Audit Agency, and over six years with the US Army Procurement Center Frankfurt as an Accounting Officer, Supervisory Accountant, and Comptroller, you were especially well qualified to be aware of the gravity and implications of your actions. * * *

As entitled by Department of the Army Civilian Personnel Regulations, plaintiff appealed his removal to the major commander, the Commander in Chief, United States Army, Europe (CINC USAREUR). Incident to such an appeal plaintiff was entitled to an evidentiary adversary type hearing before a grievance examiner, who was to make findings and conclusions for submission to the Commander in Chief. This was held on May 24, 1965.

At the administrative hearing Colonel Larsen justified his ouster of the plaintiff on the ground that Mr. Rifkin's position required him to sign documents authorizing the outlay of huge amounts of Federal funds, and that such authority required a man whose trustworthiness and absolute honesty in all matters is beyond all doubt in the minds of both his superiors and subordinates, whereas plaintiff's conduct had

permanently impaired that trust. The grievance examiner found that there was no question as to the objective facts of plaintiff's conduct, but that the maximum penalty, which under the regulations could have ranged from a 5-day suspension to removal from the Federal Service, was too severe for the offense.

She was of the view that inadequate consideration had been given to plaintiff's prior record of more than 20 years of exemplary Federal, military and civilian service and that his one fall from grace was not in the course of his regular duties and did not show that he had or would betray a trust involved in such duties. With respect to the commanding officer's finding that Rifkin had intended to defraud the Government, she found more persuasive the statements of two of his co-workers that his misdeed was the product of personality traits which placed undue emphasis upon recognition of his prestige and importance, rather than any intent to defraud. Moreover, she found that "there is no regulation which states that Mr. Rifkin was *not*, even as a GS 12, precluded from first class accommodations", and that there was a question whether the Government had suffered any loss and whether the loss would not have been considered an acceptable condition on another sailing date.

The grievance examiner concluded that the penalty of removal was too severe under the circumstances of this case because (1) while plaintiff did use an official document to defraud the Government, there was no evidence that at the time of alteration he intended to so defraud; (2) he had a long career of faithful and outstanding service and (3) he could still render trustworthy and effective service in another position. Accordingly the examiner recommended that plaintiff be transferred to another or-

ganization at a different location, suspended with loss of pay for up to 6 months, or reduced to a lower grade and position in which he would have no responsibility for disbursing funds, or to a nonsupervisory position.

As allowed in the Department of the Army Civilian Personnel Regulations, the Commander in Chief, Europe, referred the recommendations of the grievance examiner to an Employee Appeals Review Board, at his headquarters, consisting in this instance of two army officers and one civilian employee. In July 1965, the board found that "the charge of altering and using an official document to defraud the United States Government is supported", that no relief should be granted due to the seriousness of the act and the comparative possible sentences if found guilty in a civilian or military court, and that accordingly Mr. Rifkin's appeal should be denied and his removal from the Federal Service be finalized for the good of the Federal Service.

On August 30, 1965, the Commander in Chief, Europe notified plaintiff that the appeal record "clearly supports the charge that you did alter and use an official document to defraud the United States Government" and that his removal would promote the efficiency of the Federal Service. Therefore, he would not set aside or modify Colonel Larsen's decision. He also advised plaintiff of his right to seek review either by the Secretary of the Army or the Civil Service Commission, but not by both. (Civilian Personnel Regulation C6, S1.2-6a.(2)(i).)

Plaintiff elected to appeal to the Secretary of the Army. In addition to challenging the penalty of removal as grossly excessive and not warranted, plaintiff raised the issue of discriminatory treatment of civilian personnel vis-a-vis military personnel by comparing his situation to that of a military

officer with the Procurement Agency who had received substantially lighter punishment for an allegedly similar offense. After consideration of further information about this incident supplied by plaintiff at the Secretary's request, the Employment Policy and Grievance Review Board stated that "the charge of altering and using an official document to defraud the United States Government was supported by substantial evidence and warrants the action taken". The board directed an inquiry to Headquarters, United States Army, Europe (USAREUR), regarding the severity of the penalty. The board noted its agreement with Headquarters, USAREUR's response to the effect that a person who had plaintiff's responsibilities for certification and financial management of procurement funds must exemplify the highest standards of personal integrity and "Mr. Rifkin's deliberate action to defraud the United States necessitated his removal." On April 27, 1966, the Secretary of the Army sustained the removal as "appropriate in light of the nature of your offenses and your position of trust" and not an abuse of administrative discretion.

On June 3, 1966, the president of the American Federation of Government Employees wrote to the director of Civilian Personnel of the Army concerning the possible use of *ex parte* evidence in plaintiff's case. On July 28, 1966, the department supplied plaintiff copies of three documents so used: the letter dated July 2, 1965, from the Commanding General, Communications Zone Europe, to Commander in Chief, United States Army, Europe; the memorandum to the Deputy Chief of Staff at CINC USAREUR from the Appeals Review Board, dated July 27, 1965, setting forth its recommendations; and the comments on plaintiff's appellate brief that were furnished the Secretary of the Army by the Commander in Chief, United States Army, Europe, on

March 2, 1966. Plaintiff's attorney was advised that he could submit any comments on the documents, and, under date of August 22, 1966, he did so. His comments were forwarded to the Office of the Under Secretary, Department of the Army, for consideration. Such submission together with the documents were considered by the Army, and in a supplemental report the Employment Policy and Grievance Review Board found no facts warranting modification of its original decision. On November 25, 1966, the Deputy Under Secretary of the Army advised plaintiff that it had been determined that there was no reason for modifying the department's decision of April 27, 1966.

On June 2, 1966, plaintiff appealed to the Civil Service Commission. On June 29, 1966, the Appeals Examining Office disallowed the appeal on grounds that plaintiff had exhausted his appellate rights by filing an appeal with the Secretary of the Army. Plaintiff's appeal of this decision to the Commission's Board of Appeals and Review was also denied on September 8, 1966. Meanwhile during 1966, plaintiff's wife wrote to the President of the United States complaining that her husband had been victim of religious discrimination. The matter was referred to the Equal Employment Officer of the Army who determined that the appeal had not been filed within the statutory period and it therefore could not be considered. This decision was then appealed by plaintiff to the Civil Service Commission which sustained the Army's decision, most recently on April 13, 1967. Plaintiff's further efforts in 1969 to have the Army change Standard Form 50 issued him at the time of his removal, which stated "Employee altered and used an official document to defraud the US Government", to omit any reference to the word fraud, were also fruitless. Suit was filed in this court on December 8, 1970.

Following his removal, plaintiff continued to reside in Germany. Eventually, in 1970, he obtained a job in the United States Army Commissary as a sales clerk, GS-3, Step 1, at an annual salary of $5,212. By August 1974 he had been promoted to supervisory supply clerk, GS-5, Step 10, earning $10,467.

Plaintiff's rights are derived generally from Section 14 of the Veterans' Preference Act of 1944, 58 Stat. § 390, as amended August 4, 1947, 61 Stat. § 723, 5 U.S.C. § 863 (1964 ed.), the current revision of which appears in 5 U.S.C. § 7512. This provides that discharge and other adverse actions against preference eligible employees may not be taken except "for such cause as will promote the efficiency of the service." Added to this are the further judicially imposed requirements that a department head must follow its own regulations voluntarily adopted for dealing with its employees. (*Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957)); that his actions thereunder may not be arbitary or capricious, or without substantial evidence (*Ciambelli v. United States*, 198 Ct. Cl. 240 (1972); *Urbina v. United States*, 180 Ct. Cl. 194, 208 (1967); *Louks v. United States*, 184 Ct. Cl. 361, 370, 395 F.2d 993, 997 (1968)); and his exercise of discretionary authority may not be abused (*Jacobowitz v. United States*, 191 Ct. Cl. 444, 458-59, 424 F.2d 555, 563 (1970); *Ciambelli v. United States*, *supra* at 251-52).

The Severity of the Penalty

There is no dispute that the acts charged were in fact done. Plaintiff's principal plea is that the penalty of removal was too harsh both in the light of the nature of his single transgression and his long history of unblemished and superior Government service.

Recent decisions of this court have outlined the limited review functions of this court with respect to penalties. In *Grover v. United States*, 200 Ct. Cl. 337, 353 (1973) the court asserted:

> * * * This court has stated on many occasions that the measure of the penalty is within the discretion of the agency. *Birnholz v. United States*, 199 Ct. Cl. 532 (1972); *Heffron v. United States*, 186 Ct. Cl. 474, 484, 405 F.2d 1307, 1312 (1969); *Liotta v. United States*, 174 Ct. Cl. 91, 96 (1966); *De Nigris v. United States*, 169 Ct. Cl. 619, 625 (1965). There are, of course, exceptions to this general rule where it can be shown that the decision made by the agency was the product of abused discretion. The test for the abuse of discretion requires a showing by the plaintiff that the penalty is so harsh that there is "an inherent disproportion between offense and punishment." *Heffron v. United States*, *supra*, 186 Ct. Cl. at 485, 405 F.2d at 1312-13; *Clark v. United States*, 162 Ct. Cl. 477, 484 (1963).

However, when such abuse of discretion has occurred, the court has not hesitated to set aside penalties, whether or not they have been within the range of permissible alternatives. *Clark v. United States*, 162 Ct. Cl. 477 (1963); *Jacobowitz v. United States*, 191 Ct. Cl. 444, 458-59, 424 F.2d 555, 563 (1970); *Cuiffo v. United States*, 131 Ct. Cl. 60, 137 F. Supp. 944 (1955); and *cf. Daub v. United States*, 154 Ct. Cl. 434, 292 F.2d 895 (1961).

Civilian Personnel Regulation C2.4 provides that the severity of disciplinary action is left to the discretion of appropriate officials of the employing activity, but it does set out

a list of suggested penalties. For the applicable offense, "False statements, misrepresentation, or fraud in application blank or other official records submitted to the Department of the Army", the suggested range of penalties for a first offense is "5-to 10-day suspension, or removal." (CPR C2, app. B.)

That this requires an exercise of informed discretion by the appropraite official seems clear. Throughout the regulations are directions that the penalties listed are suggestive only, they are to be used as a general guide, due consideration should be given to mitigating circumstances, and the penalty imposed should be no more severe than necessary to correct the situation and maintain discipline.[1] The severity of a removal action is emphasized in the regulations on several occasions. Removal is to be imposed only where the circumstances demand it.[2]

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[1] *See* CPR C2.1-6a; C2.4-2a; CPR C2 app. B.

[2] CPR S1.3-3 "Removal" provides:

> * * * Before proceeding with a removal action, consideration should be given to whether some other type of action would be more appropriate. * * *
>
> *Job Protection Requirements*
>
> *a.* A removal is the most drastic action that can be imposed against an employee in that it not only results in his separation from the rolls but may also result in his being denied further employment. Therefore, the greatest care and judgment must be exercised and the full requirements of section 2 must be observed in effecting this action. * * *
>
> (continued)

An abuse of discretion occurs not only when an official disregards important pertinent facts of which he knows but just as well when he accepts and fails to ascertain the truth of a material proposition of fact upon which is decision depends and which is in fact untrue. *Cf. Crocker v. United States*, 130 Ct. Cl. 567, 573-75, 127 F. Supp. 568, 571-73 (1955); and *United States v. Tucker*, 404 U.S. 443 (1972).

The record in this case establishes that the commanding officer who imposed the penalty of discharge was under a misapprehension of material fact which was conveyed to and was accepted by his superiors at every level of review. Throughout the proceedings, beginning with the decision of Colonel Larsen runs the theme that plaintiff had deliberately attempted to and did defraud the United States Government out of money or moneys worth and therefore he could not be trusted in his important position in connection with the disbursement of large sums of money. Major General Kyser in his *ex parte* communication of July 2, 1965, to the Commander in Chief, Europe, urging that the grievance examiner's recommendations be overruled did so on the grounds that plaintiff having committed "fraud against the United States" his sense of propriety was inconsistent with his fiduciary responsibilities, and that "retention of an employee who is known to have committed a fraud against the United States" would unfavorably affect the integrity of others. Both the

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[2] (Cont'd)

> *Relationship to Other Actions*
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> *b.* Removal actions will not be initiated in those cases where some other separation action covered by these regulations is more appropriate. * * *
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> * * * * * * *

Commander in Chief,. Europe, and the Secretary of the Army, as well as the boards which assisted them accepted Colonel Larsen's characterization that plaintiff had used the altered documents to defraud the United States. No document in the record shows that any of them gave any express consideration to either agree or disagree with the question raised by the grievance examiner in her opinion when she noted that "there is no regulation which states that Mr. Rifkin was *not*, even as a GS 12, precluded from first class accommodations" and that the $351 would have been considered an acceptable Government cost on another sailing date.

Title 5 U.S.C. § 5731 provides that the allowance for transportation expense for Government employees, generally "may not exceed the lowest first-class rate by the transportation facility used." The Standardized Government Travel Regulations issued by the Executive Office of the President, Bureau of the Budget, pursuant to statutory authority in effect during 1965, provides:

> 3.6 *Accomodations on trains, steamers, and airplanes.*
>
> * * * * *
>
> b. Steamer accommodations.
>
> (1) *Staterooms.* – The minimum first-class accommodation will be allowed when stateroom is included in cost of passage or is a separate charge, * * * The travel order or other administrative determination may, however, specify the use of an accommodation less costly than the minimum first-class accommodation when suitable for a particular voyage. * * *

The Department of the Army's Civilian Travel Regulations (CPR T3) state at paragraph 1-2, that the Government Travel Regulations permit the exercise of administrative discretion by the Secretary of the Army, and therefore, "[w]here such administrative authority has been exercised in the regulations to prescribe less than the legal maximum, the regulations are the controlling authority." But none of the Civilian Travel Regulations produced by defendant states less than first-class travel has been prescribed for GS-12 employees and that they are not entitled to the lowest first-class steamer accommodations such as were booked by the MSTS officer on the SS United States for others. Nor did plaintiff's travel authorization limit plaintiff to less than lowest first-class steamer acommodations to which he was entitled under the Standardized Government Travel Regulations.

The undisputed testimony was that there was no fixed dividing line between grades entitled to first class and grades entitled only to lesser accommodations. On some sailings GS-12's were assigned first-class accommodations. It all depended on the blocks and mixes of accommodations booked in advance for a particular sailing by the MSTS officer in charge as compared to the actual demand therefor. Thus, it appears that assignment of preferred accommodations in order of rank or grade was merely an orderly method of allocation to suit the requirements of a particular day's reservations. Accordingly, while plaintiff's use of an altered travel authorization falsifying his grade was unquestionably an improper act designed to obtain an unwarranted advantage over others, it does not necessarily follow, as Colonel Larsen assumed and his superiors accepted, that it was designed to or in fact did defraud the United States out of money or moneys worth to which under no circumstances was the plaintiff entitled.

At the time the removal was effected neither Colonel McKee nor Colonel Larsen accurately understood the process by which the transportation command assigned accommodations. Colonel McKee apparently knew nothing of the system used, but thought that by presenting the falsified orders, plaintiff was obtaining a class of passage to which he could not have otherwise been authorized. Colonel Larsen's misconception was even more in point. He believed that the cut off was fixed between GS-12 and GS-13, with GS-12's and below always traveling cabin class and GS-13's always traveling first class. Both of these men, therefore, regarded plaintiff's action as an attempt by him to obtain something to which he never would have been entitled without the falsified order. Both perceived the falsification to be a deliberate attempt to defraud the Government.

When the actual process was called to the attention of Colonel McKee and Colonel Larsen at the trial, and it was explained that the cut off varied from trip to trip, both men admitted this affected their perception of the seriousness of the offense. Colonel McKee testified, "It would certainly have removed one of the elements of the culpability, in my opinion". Colonel Larsen testified, "It is a mitigating circumstance, yes sir."

The record also discloses that despite the reason given in their removal notice those responsible for that decision did not in fact believe that plaintiff's falsification of his grade was motivated by the desire to defraud the United States, but disregarded their own evaluation because of a lack of comprehension as to the nature and scope of their discretionary function with respect to meting out penalties. At the time of the incident, Major Murphy, the Procurement Judge Advocate, had known plaintiff for almost 3 years. Major Murphy was convinced that plaintiff's motivation in

the falsification was a desire for prestige ("to be a big shot"); he had no doubt that plaintiff would never steal a dime from the Army. He conveyed this appraisal to Colonel Larsen, who, as a newcomer, sought the advice of others on his staff. Colonel Larsen admitted that he had no reason to differ with Major Murphy's appraisal; several others on his staff had concurred with this view of plaintiff's basic honesty in his duties but desire for prestige. Colonel Larsen, however, also relied on Major Murphy's legal advice that while as a layman he could accept such appraisal of plaintiff, his motivation and his basic honesty, as a matter of law he was required to disregard such considerations in imposing punishment.

While a false statement is in itself an offense justifying punishment, it is not necessarily of the same order of gravity as an attempt to defraud or cheat the United States. *Cf. Urbina v. United States*, 180 Ct. Cl. 194, 218-19 (1967). Yet this was the essence of the removal notice and was repeated at every level of review (other than by the grievance examiner) as the reason for affirming the removal.[3]

In *Drucker v. United States*, 204 Ct. Cl. 514, 518, 498 F.2d 1350, 1352 (1974), the court quoted with approval a definition of administrative discretion from BLACK'S LAW DICTIONARY (rev. 4th ed. 1968), which states that–

> [w]hen applied to public functionaries, discretion means a power or right conferred upon them by

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[3] The extent of plaintiff's fiduciary responsibilities was also grossly exaggerated and reiterated at every level of review. His function was primarily accounting. He neither handled nor exercised any discretion with respect to the disbursement of funds.

> law of acting officially in certain circumstances, according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others.

Rather than following "the dictates of their own judgment and conscience", the officers concerned in this case deliberately disregarded their personal evaluation of plaintiff and the motivation for his offense. Major Murphy seemed to believe that a lawyer could not and should not be influenced by personal evaluations of intent or human frailties, sympathy, or compassion; and he imposed this narrow view of his legal responsibilities in the exercise of discretion upon Colonel Larsen. Such a view eliminates the very essence of discretion, following the dictates of one's own judgment and conscience. Under this view of discretion, the decision is only a mechanistic choice uninfluenced by personal consideration, conscience, or judgment. It is more accurate to describe the decision as an abdication rather than an exercise of discretion.

Evidence in the record reflects other misconceptions involving the authorized range of penalties which likewise prevented the proper exercise of discretion with respect thereto. Colonel McKee and Colonel Larsen had both been advised by Major Murphy, the Procurement Judge Advocate, that the prescribed schedule of penalties allowed for either very minimal punishments or removal, with no variations or gradations in between. At the trial (now) Colonel Murphy explained:

> The reason why he could not be suspended beyond 30 days was non-legal, but policy as they told me, non-law in a sense. It was based on a theory that if a man was to be suspended more

> than 30 days then he should be removed. And you could not keep a vacancy open for six months, nine months, or one year because it didn't make Civil Service sense. This is the rationale I got from the CPO study.

The record shows that one factor definitely influencing the decision by both men that removal was warranted, was the belief that the only other alternative, a maximum suspension of 30 days, was too minimal a punishment for the fraudulent offense charged. Such a limited view of the range of permissible penalties runs directly counter to the mandate of the applicable regulations. CPR S1.3-10b.(1), specifically permits a suspension for more than 30 days, provided full job protection rights are accorded.

In this same vein, Major Murphy advised his superior that "It is illegal * * * to transfer for punishment purposes." According to his testimony, transfer was only appropriate for "inefficiency or incompetency at work". Major Murphy was apparently relying on CPR S1.3 "Adverse Actions" at 3-11.c.(1), which states:

> A change to lower grade will not be imposed as a disciplinary action. When an offense warrants the imposition of a penalty, determination of the appropriate action will be made in accordance with CPR C2.

This regulation, however, prohibits only demotions for the same work, it says nothing about transfer to another position. Major Murphy admitted that a voluntary demotion or voluntary transfer would have been allowable. In fact, when shortly after plaintiff's discharge by Colonel Larsen, the civilian personnel officer who advised Colonel Larsen on plaintiff's punishment, was himself found to have falsified his

own personnel records by claiming education qualifications for courses of study he never took, he was permitted to accept a reduction in grade and nominal reduction in salary from GS-14 to the top of GS-13 and transfer to another location. However, the availability of such an alternative sanction was never considered nor discussed with plaintiff.

For the foregoing reasons the decision removing plaintiff represents an abuse of discretion and cannot stand.

The Ex Parte Submissions

The court's remand order of April 27, 1973, requested resolution of the issue with respect to the use of *ex parte* evidence against plaintiff. In *Camero v. United States*, 179 Ct. Cl. 520, 375 F.2d 777 (1967) and *Jarrett v. United States*, 195 Ct. Cl. 320, 451 F.2d 623 (1971), the court held that the Government's *ex parte* communications concerning the merits of a case to those responsible for the decision in proceedings prescribed by regulations to be based on evidence and adversary in nature invalidated a decision adverse to a Government employee.

Plaintiff alleges the improper use of at least 12 *ex parte* documents during the administrative appellate proceedings without the knowledge of plaintiff or his counsel. Plaintiff, however, identifies only one document, Colonel Larsen's Memorandum for Record of May 20, 1965, sent to the Commanding Officer of the United States Army Communications Zone (COMZ) at Orlean. This document was not a communication to one having the responsibility for a decision in an adversary hearing on evidence; the purpose, as testified

to by Colonel Larsen, was routine – to keep his own commander, General Kyser, informed on matters pending within the Procurement Agency command.

When the American Federation of Government Employees (AFGE) raised the *ex parte* issue with the Army, plaintiff's counsel was furnished three documents:

(1) The memorandum from the Employee Appeals Review Board to the Deputy Chief of Staff of the Commander in Chief, Europe, dated July 27, 1965, setting forth its recommendations with respect to plaintiff's appeal and the grievance examiner's report. CPR C2, E2.5-5a allows the major commander to "prescribe the methods and procedures" for review, on the merits, of the transcript of the grievance hearing and the examiner's report. Pursuant to this authority, an Employee Appeals Review Board was set up by CINC USAREUR to review the record and to make recommendations to him. It was not unreasonable for the Commander in Chief, Europe, to seek assistance from his staff, the members of which had not been involved in the case. The board made a complete review and report. This appears to be allowable under the regulations, and since the panel's review was not an adversary hearing it was not inherently unfair or prejudicial.

(2) The comments on plaintiff's appellate brief that were furnished the Secretary of the Army by the Commander in Chief, Europe, on March 2, 1966.

This was prepared pursuant to a request by the Secretary of the Army for further information concerning the issues raised in plaintiff's appellate brief to the Secretary. The request sought information with respect to: (a) basis for determination that removal rather than a lesser penalty

was warranted, as recommended by examiner; (b) circumstances of the major "B" case, urged by plaintiff to show discriminatory treatment; and (c) intention of Colonel Larsen to fill the comptroller position with a military officer, also claimed by plaintiff. The request directed CINC USAREUR to obtain information from COMZ concerning the latter two matters.

With regard to an appeal to the Secretary of the Army from a major commander's decision, CPR C2, E.5-6.a.(1) provides:

> The employees request for review will be added to the appeal record along with any comments the activity commander or major commander wish to make, and will be forwarded through channels to the Office, Secretary of the Army.
> * * *

Since the regulations providing for such appeal specifically contemplate "comments" by the activity and major commander, and are silent concerning making such comments available to an appellant, it appears that such documents were proper.

Moreover, since the delegate of the Secretary of the Army made both documents (1) and (2) available to plaintiff, gave plaintiff's counsel an opportunity to file a brief in response thereto and reconsidered his decision in the light of such brief, plaintiff has not been deprived of any rights granted by the regulations or which affect the basic fairness of the appeal proceeding.

(3) A July 2, 1965 letter from COMZ (Major General Kyser) to Commander in Chief, Europe.

Colonel Larsen had been keeping his immediate superior, Major General Kyser (COMZ), informed of his actions with respect to the Rifkin matter. After the grievance examiner's report was issued on July 2, 1965, General Kyser unilaterally wrote to the Commander in Chief, Europe, before whom plaintiff's appeal was pending, without furnishing a copy to plaintiff, urging that the recommendations of the grievance examiner not be followed and that the removal be sustained. He stated "[t]hat fraud against the United States was committed is adequately established"; that the removal of an employee in a position of trust who has failed with respect to honesty and integrity is necessary to promote the efficiency of the service; that "[t]he retention of an employee who is known to have committed a fraud against the United States" would unfavorably affect the morale, integrity and high standards of conduct of other employees; and discharge was not too severe a punishment because plaintiff's fraudulent act could have been the basis of a prosecution which could have warranted a $10,000 fine and 5-years imprisonment.

General Kyser's letter is troublesome. It sought to influence the result of an adversary hearing required to be based on evidence by imposing his own conclusions in the appeal. Since it urged that the grievance examiner's recommendation for a punishment less severe than discharge not be followed because the plaintiff was guilty of a fraud against the United States which could even have warranted fine and imprisonment, it was certainly prejudicial to plaintiff. Major General Kyser was Colonel Larsen's direct superior and Colonel Larsen testified he conferred frequently with the general and his staff and kept them fully informed on everything he did in the Rifkin case, by memoranda, telephone and personally. Thus General Kyser's per-

spective and views on the case were derived at least to some extent from Colonel Larsen, who was a party to the appeal. Colonel Larsen also testified that General Kyser was extremely concerned and upset about the Rifkin case and needed no convincing from him to write the letter to higher headquarters expressing his views about the case while the appeal was pending. The letter was in fact considered by the Commander in Chief, Europe, and his staff, in deciding the appeal, since it is expressly referred to in a memorandum dated 27 July 1965 from a panel set up by him, and is quoted in a letter to the Secretary of the Army dated 2 March 1966.

General Kyser's letter of July 2, 1965, states that it is in compliance with USAREUR Regulation 690-32, paragraph 6(b). It is not clear that such regulation, which is set out below,[4] does authorize an *ex parte* communication of the sort at issue here. In any event, if it did, a regional regulation which would authorize *ex parte* comments such as those of General Kyser's would be inconsistent with the entire adversary and evidentiary grievance procedure set up by the Army Civilian Personnel Regulations. This letter was so prejudicial to plaintiff as to destroy his right to a fair

[4] "6. *Processing Appeals From Adverse Actions.* a. An information copy of the Report of Inquiry and Grievance Record, which is forwarded directly to the Personnel and Administration Division, Headquarters USAREUR (CPR E2.5-4b), will be transmitted to the appropriate area commander. When the activity concerned reports directly to a staff division of Headquarters USAREUR, a copy of the Report of Inquiry and Grievance Record will be forwarded to the head of that staff division.

b. Immediately on receipt of the copy of the Report of Inquiry and Grievance Record by the commander indicated in a above, a qualified staff officer will be designated to analyze the appeal and recommend appropriate action."

and impartial hearing before the Commander in Chief, Europe.

It is unnecessary to decide at this point whether the reconsideration of its decision by the Office of the Secretary of the Army after plaintiff was allowed to respond to the three *ex parte* documents is enough to cure the unfairness in the appeal to the major commander, since it has already been decided that the penalty should be vacated for other reasons.

DUTY STATUS

Plaintiff claims that regardless of the correctness of his discharge he was wrongfully deprived of his pay for the period from April 13, 1965 to August 30, 1965. The essence of his claim is that by regulation an oversea employee of the Army, recruited in the United States, is entitled to remain in duty status until the completion of his appeal to the major command.

The Civilian Personnel Regulations provide in pertinent part (CPR E2.5):

SPECIAL PROVISIONS FOR OVERSEA EMPLOYEES

5-8. In processing an action under CPR S1 discharging for cause a United States citizen employee serving overseas who is eligible for return transportation at Government expense, or who is ineligible for such transportation but who cannot remain in the oversea area after separation because of immigration requirements and/or agreements requiring repatriation to the country of residence, the special provisions set forth below will be applicable. These provisions do *not* apply to separation of an individual serving a probationary or trial period.

* * * * * * * *

c. If the employee files an appeal and requests authority to remain in the command, the installation will extend the notice period and inform the employee that he will be retained at the installation in a duty status pending the hearing and final disposition of the appeal at the major command level. Should the reasons for the removal action preclude retaining him on duty, he will be retained at the installation but suspended without pay. The suspension must be processed under CPR S1 as a separate personnel action. The employee may also be permitted to remain at the installation in annual leave or leave without pay status *provided the submission of a written request for such leave is a completely voluntary action on the part of the employee.* Enforced annual leave will not be directed by the installation for the purpose of removing the employee from a duty status. [Emphasis in original.]

It is clear from the record that plaintiff's waiver of duty status was not "a completely voluntary action" within the meaning of the regulation and plaintiff did not waive duty status pending resolution of his appeal. Prior to the April 9, 1965 meeting with plaintiff, Colonel Larsen had been instructed by his judge advocate, Major Murphy, and the civilian personnel officer, Mr. Rowe, that plaintiff was likely to request to remain in duty status pending his appeal, but that plaintiff did not qualify under the regulation. Their rationale was that plaintiff, having just used his entitlement to travel at Government expense by means of a round trip to the United States and not yet having completed a new tour of duty, was not "eligible for return transportation at Government expense" and therefore not within the scope of the Special Provisions.[5] At the meeting plaintiff indicated that he did intend to request duty status and that the letter of appeal he had prepared so indicated. Colonel Larsen told plaintiff that the letter was unacceptable and instructed plaintiff to redraft the letter requesting annual leave or leave without pay. Despite their objections, plaintiff and his counsel submitted a revised letter on April 9, 1965, which complied with that direction. By letter of April 12, 1965, Colonel Larsen amended his original decision to permit plaintiff to utilize his annual leave and then continue in leave without pay status. The decision stated:

> 3. * * * However, in order to minimize personal hardship to you and your family during the period of appeal, paragraph 1, reference 1c is amended to delete 12 April 1965 as the effective date of your removal. I find no justifiable basis for continuing you in a duty status pending the receipt of a decision on your appeal. I do approve your request for annual leave and leave without pay during this period beginning at 0730, 13 April 1965.
> * * *

This enabled plaintiff to retain commissary, post exchange, and other similar privileges through September 17, 1965.

Defendant's position is that plaintiff is not entitled to the beneift of the Special Provisions for Oversea Employees because, having just taken advantage of his biennial reemployment leave and round-trip transportation to the United States, under the Civilian Travel Regulations he became ob-

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[5] There is no contention that plaintiff qualified as one who could not remain overseas because of immigration or repatriation requirements.

ligated to serve an additional 2 years before becoming "eligible for return transportation at Government expense" within the meaning of the special provision.

The Civilian Travel Regulations, CPR T3, provide (par. 1-6) that each new or current employee selected for assignment to an oversea official duty station is required to sign a transportation agreement prescribing a stipulated period of oversea duty before transportation at Government expense to the oversea area may be authorized and that he has a vested right to return transportation only upon completion of the prescribed period of service (here 2 years). The standard transportation agreement, which is attached to the regulations, provides for round-trip transportation of such employees, their immediate families, their household goods and personal effects at Government expense, but employees are not eligible for the return portion if they separate voluntarily or are separated involuntarily because of misconduct prior to completion of the agreed period. Paragraph 2-11 of the regulations allows and encourages employees, upon completion of the minimum period of service and execution of an agreement for a new tour of duty, to utilize this transportation for "reemployment leave" in the United States. The prescribed tour for the new transportation agreement then begins as of the date the employee returns to work. (Par. 2-11.a.)

The travel regulations set forth qualifications for return "transportation entitlement" from an oversea duty station to place of residence. (CPR T3.2-4.c.) In addition to completion of the agreed minimum period of service, these include the requirements that the employee has been reassigned or transferred from, or recruited in the United States; or if he is a United States citizen hired locally that he maintain bona fide residence in the United States, or be a dependent of those entitled to return transportation. For purposes of such entitlement an individual is considered to have prima facie residence in the United States if he is a student formally enrolled in a recognized institution of learning; a traveler absent from the United States for not more than 6 months; a member of the Armed Forces separated locally for the express purpose of accepting Federal employment; or an employee of another Federal agency, instrumentality, Government contractor, international organization, or other activity operating in support of the United States or its personnel, if the individual was recruited in the United States under conditions of employment which provided for return transportation.

It is apparent that even for purposes of the travel regulations the meaning of a term such as "eligible for return transportation at Government expense" would depend upon the context in which the phrase appeared. For example, section 1-6 provides that upon completion of the prescribed period of service the otherwise qualified employee has a "vested right" to return transportation at Government expense. The implication is that completion of the minimum period of service results in "vesting" and that prior to that time one is eligible if he eventually meets the other conditions for return transportation at Government expense. Similarly, section 2-4.c.(2)(d) provides that to avoid misunderstanding and disagreement at a later date as to meeting the conditions "*entitlement to return transportation will be determined at time of appointment and recorded through execution of [the] transportation agreement*" (emphasis in original). It is obvious that in such context "entitlement" means qualified other than by completion of the service period. "Eligible" would certainly appear to mean less than "vested" or "entitled".

It is concluded that in the context of the Grievance and Appeal Procedures, CPR E.2, Special Provisions for Oversea Employees, section 5-8, the provision for allowing employees "eligible for return transportation", who are appealing removal actions, to remain in duty status pending disposition of their appeal, is not limited to the time after they have completed their period of service.

It is important to note that the special provision covers not only employees eligible for return transportation but to two other groups, to wit:

> [A] United States citizen employee serving overseas who is eligible for return transportation at Government expense, or, who is ineligible for such transportation but who cannot remain in the oversea area after separation because of immigration requirements and/or agreements requiring repatriation to the country of residence * * *.

The regulations contain no explanation as to the reason why the three categories of employees are to be retained in duty status pending appeal of their discharge for cause, or as to what common purpose is served by similar treatment for those eligible for return transportation, those who cannot remain in the area because of immigration restrictions, and those who must be repatriated. Nor does defendant suggest any common denominator. Absent any other interpretative aid, it is inferred that the purpose of the Special Provisions for Oversea Employees is to insure that United States citizens who would be unlikely to be able to find foreign employment because of cultural or legal impediments should not be effectively deterred or hampered in the exercise of their right to appeal their discharge to the major command

level by their inability to support themselves in the foreign area while the appeal is pending.

In the context of the Grievance and Appeal Procedure "a citizen employee * * * who is eligible for return transportation at Government expense "is one who is a resident of or is reassigned or transferred from or recruited in the United States, or if hired locally maintains bona fide residence in the United States and has not been absent for more than 6 months, or was a student or member of the Armed Forces, or employee of another Federal or similar agency who transferred for the purposes of obtaining the particular employment, *i.e.*, all those covered by a transportation agreement, whether or not the right to the return portion has matured. A regulation that an employee who meets the above requirements is not eligible to remain in duty status pending the appeal from his removal because he does not have 2 years of service since his last home leave, while at the same time one who does not meet such requirements but is barred from remaining in the area by immigration restrictions or international repatriation agreement is entitled to duty status after only one day's employment would create a discrimination without discernible purpose. Under defendant's construction, the only persons who would ever be "eligible for return transportation" and therefore entitled to remain in duty status, would be those who had completed their minimum service but had not yet exercised their right to reemployment leave. This would mean that an employee could come within the protection of the special provisions only once every 2 years, and then remain eligible for this protection for probably only a few months at most. Such an anomalous construction would appear to defeat the purpose of the special provisions.

A second factor that makes the Government's interpretation untenable is that the same prerequisite, *i.e.*, "eligible for return transportation at Government expense", applies to retention in leave status, which Colonel Larsen granted without hesitation. If plaintiff was not within the class of persons to whom the special provisions applied, then obviously he could not be afforded *any* of the protections or rights created therein. The introduction to the special provisions identifies those employees for whom a discharge action must be processed in accordance with the special procedures. Paragraph c begins by providing that an employee requesting to remain in the command, "will be retained at the installation in duty status pending the hearing and final disposition of the appeal at the major command level". If it is inappropriate to keep him in duty status, a separate suspension action must be processed with appropriate notice and hearing procedures. If the employee abandons his right to duty status and *voluntarily* requests annual or without pay leave status then this may be granted. The regulations emphasize the need for voluntariness by italicizing the phrase "*provided the submission of a written request for such leave is a completely voluntary action on the part of the employee*". The emphasis is reinforced by the next sentence which warns that "[e]nforced annual leave will not be directed by the installation for the purpose of removing the employee from a duty status." It would seem, therefore, that by telling plaintiff he was not eligible for duty status yet requiring him to rewrite his request for annual and without pay status, Colonel Larsen was able to obtain pro forma compliance with the requirement of voluntariness and immediately remove plaintiff from the command. Plaintiff should now be compensated for the period he was wrongfully deprived of duty status.

LACHES

Defendant argues that since the decision to deny plaintiff's second appeal was announced by the Deputy Under Secretary of the Army on November 25, 1966, but plaintiff's petition was not filed until 4 years later, on December 8, 1970, it is barred by laches.

The doctrine of laches as a defense to a Government employee's suit claiming wrongful discharge brought within the statutory period of limitations has Supreme Court sanction. It first appeared in *Arant v. Lane*, 249 U.S. 367 (1919), a mandamus suit brought to require the Secretary of the Interior to vacate an order dismissing the petitioner from his Government employment and to restore him to his position. The Court held that mandamus is a remedial process which is awarded not as a matter of right but in the exercise of sound judicial discretion and upon equitable principles. Since it is generally regarded as not embraced within statutes of limitations applicable to ordinary actions it is subject to the equitable doctrine of laches. It found that during the 20 months which had elapsed before the plaintiff assert his rights in court, another person had been hired and filled plaintiff's position. Sound public policy demanded therefore that plaintiff take action diligently to assert his rights so as to avoid disruption of the Government service and the payment of two salaries for a single service. It held that the unjustifiable 20-month's delay showed a lack of the requisite diligence by one seeking equity. The *Arant* case was followed shortly thereafter by two other decisions in which the Court expanded the application of the laches doctrine to pay cases on grounds of public policy and prejudice to the public interest arising from lack of diligence in contesting wrongful removals, despite the absence of any request for the equitable mandamus remedy. *Nicholas v.*

United States, 257 U.S. 71 (1921) and *Norris v. United States*, 257 U.S. 77 (1921) (involving 3-year and 1-year delays).

This court has of course followed the Supreme Court decisions and has applied the laches doctrine when it has been properly raised by defendant and when prejudice to the Government attributable to an unjustified delay has either been expressly shown or presumed. The prejudice has been for the most part in impairment of the Government's ability to defend because of unavailability of witnesses or the loss of evidence or of recollection of the facts, and/or the payment of double salaries. *Henry v. United States*, 139 Ct. Cl. 362, 153 F. Supp. 285 (1957); *Wilmot v. United States*, 205 Ct. Cl. 666 (1974); *Gersten v. United States*, 176 Ct. Cl. 633, 364 F.2d 850 (1966); *Alpert v. United States*, 161 Ct. Cl. 810, 821 (1963).

Delays by Government employees over shorter periods have been held to prevent consideration of the legality of their removals.[6] On the other hand, when the plaintiff has

[6] In *Alpert v. United States*, 161 Ct. Cl. 810 at 820-21 (1963), the court listed some of these cases with the approximate delay period as follows:

> "*Norris v. United States*, 257 U.S. 77 (1921) (11 months); *Morse v. United States*, 59 Ct. Cl. 139 (1924) (1 year and 2 months); *Grasse v. Snyder*, 192 F.2d 35 (D.C. Cir. 1951) (1 year and 4 months); *Arant v. Lane*, 249 U.S. 367 (1919) (1 year and 8 months); *Jones v. Summerfield*, 265 F.2d 124 (D.C. Cir. 1959), *cert. den.*, 361 U.S. 841 (2 years and 9 months); *Chappelle v. Sharpe*, 301 F.2d 506 (D.C. Cir. 1961), *cert. den.*, 370 U.S. 903 (2 years and 10 months); *Nicholas v. United States*, 257 U.S. 27 (1921) (3 years); *Plunkett v. United States*, 58 Ct. Cl. 359 (1923) (3 years and 1 month); *Evans v. Leedom*, 265

(Continued)

provided a satisfactory explanation for the delay, indicating that it was not in fact due to lack of diligence, or when the defendant has failed to show resulting counterbalancing prejudice, the bar of laches has not been invoked despite longer delay. *Bray v. United States*, Ct. Cl. No. 782-68, decided May 14, 1975 (nearly 6 years); *Cason v. United States*, 200 Ct. Cl. 424, 471 F.2d 1225 (1973) (4 years, 1 month); *Chappelle v. United States*, 168 Ct. Cl. 362 (1964) (5 years, 7 months); *Levy v. United States*, 118 Ct. Cl. 106 (1950) (5 years, 8 months); *Mallow v. United States*, 161 Ct. Cl. 207 (1963) (nearly 6 years); *Baxter v. United States*, 122 Ct. Cl. 632 (1952) (nearly 6 years). As the court summarized the doctrine in *Cason v. United States*, 198 Ct. Cl. 650, 655-56, 461 F.2d 784, 787 (1972), *rev'd on rehearing*, 200 Ct. Cl. 424, 471 F.2d 1225 (1973):

> * * * Laches are a bar only in instances where the litigant against whom the doctrine operates, by failure to act promptly, has so prejudiced and dislocated his opponent that for the court to do otherwise would operate as an injustice to the party pleading the laches defense. Both elements, delay and prejudice, must be present. * * *

In attempting to reconcile the cases all that is clear is that bright lines are difficult to draw in this field and that the counterbalancing equities must be weighed in each case.

Plaintiff's suit has two separable claims: payment for the period he was denied "duty status" and back pay since

[6] (Cont'd)

> F.2d 125 (D.C. Cir. 1959), *cert. den.*, 361 U.S. 935 (3 years and 2 months); *Miner v. United States*, 143 Ct. Cl. 801 (1958) (3 years and 6 months); *Zagurski v. United States*, 103 Ct. Cl. 755 (1945) (3 years and 6 months); * * *."

the time he was allegedly illegally removed. For the first claim it is difficult to see how the defendant suffered prejudice from any lack of diligence in bringing it to court. There is no allegation or suggestion from the record that defendant's presentation of a defense was in any way hindered by the passage of time. The period of time in question was fixed upon plaintiff's removal and, unlike the back salary claim, the compensable amount has not increased with the passage of time. Therefore, there is no reason, based on equity or fairness, to bar allowance of the duty status claim, irrespective of the reason for delay.

Plaintiff contends that his administrative remedies were not exhausted on November 22, 1966, as defendant asserts, but rather the administrative process was not completed until April 27, 1967. Regular appeal procedures were terminated on April 27, 1966, with the Secretary of the Army's decision sustaining plaintiff's removal. Thereafter, on June 3, 1966, the American Federation of Government Employees wrote to the director of civilian personnel concerning the possible use of *ex parte* evidence in plaintiff's case. The Army then furnished copies of additional documents to plaintiff and advised plaintiff that he could submit comments concerning these documents. Plaintiff's attorney did so and these were reviewed by the Employment Policy and Grievance Review Board, which reconvened to consider this new allegation. On November 25, 1966, the Deputy Under Secretary of the Army advised plaintiff that it had been determined that there was no reason for modifying the removal action. Prior to receiving this decision, on November 22, 1966, plaintiff's attorney again wrote the Army that plaintiff had illegally been deprived of duty status pending his appeal and also claimed unequal treatment because the personnel officer who had concurred with plaintiff's punishment allegedly received a much less severe penalty for a similar offense discovered shortly after plaintiff's removal. The Army's response of December 7, 1966, summarily dismissed these new allegations. Plaintiff's attorney then detailed the comparison of plaintiff's case with that of the personnel officer in a letter of January 6, 1967, to the Secretary of the Army. Inquiry into the latter case was then made by the Employment Policy and Grievance Review staff. By letter of April 26, 1967, plaintiff was advised that this comparison furnished no reason for modification of the removal. New arguments comparing later treatment of others is not a prerequisite for exhaustion of plaintiff's administrative remedies. However, plaintiff's claim for duty status and pay during the consideration of his appeal is a legitimate part of his claim and the Army did actually consider it until December 7, 1966. Therefore, that date will be considered the applicable date of exhaustion of administrative remedies for laches purposes.[7] This still leaves about 4 years to be accounted for prior to the time plaintiff brought suit.

Plaintiff's efforts after April 1967 were focused on getting his union to take legal action on his behalf or at least to finance his law suit. Even prior to that time in May 1966 plaintiff's Lodge 2348 of the American Federation of Government Employees at Frankfurt, Germany, began

[7] Contemporaneously with the foregoing, during 1966 plaintiff appealed to the Civil Service Commission which in September 1966 advised him that he had forfeited his right to such review by appealing to the Secretary of the Army. During the same year plaintiff's wife also wrote several letters to the President of the United States alleging religious discrimination in plaintiff's removal. This matter was referred to the Equal Employment Opportunity Officer of the Department of the Army. The Army declined to accept the appeal on grounds of untimeliness. In April 1967 the Civil Service Commission sustained the Army's decision.

a campaign to obtain the assistance of the national organization. In September 1966, Lodge 2348 made an intensive effort to have plaintiff's appeal prosecuted by the Legal Rights Committee of the AFGE. In July 1967, plaintiff's entire record was forwarded from Germany to Washington for review by AFGE general counsel. In October 1967 its counsel recommended that the case not be financed from the legal rights funds because apart from its merits the case was not of general importance. In October 1967, an officer of plaintiff's lodge wrote to the national vice president of the union urging reconsideration of its decision and pledging to conduct a campaign for contributions to the Legal Rights Committee to cover financing of the case. In March 1968, an officer of plaintiff's lodge wrote to the national president urging the undertaking of the appeal and then later recommended to its general counsel that it be done. In May 1968, the general counsel again expressed doubts about the narrowness of the issue as a subject for union action but suggested that if the case were filed the plaintiff's local should bear a significant portion of the legal fees and litigation expenses. In October 1968, the national vice president wanted confirmation from plaintiff's local that it would underwrite 50 percent of the case. In November 1968, the local responded that it had already sent $500 and expressed disappointment that the case had not already been filed. Further negotiations took place during the next few months with respect to the Frankfurt lodge underwriting half the fees. On January 27, 1969, the Frankfurt local advised the national office that it could not then afford to send any more money but expressed confidence that later in the year it would be able to make another significant contribution and if the appeal were successful plaintiff would also be able to make a contribution. Apparently shortly before July 17, 1969, the negotiations broke down

and the national office decided not to prosecute plaintiff's appeal. The record also reflects that in August 1968 and May 1971 plaintiff attempted by mail to hire two attorneys in the United States to bring suit, apparently on a contingency basis, but was unsuccessful. Finally, convinced in the latter half of 1969 that he could not rely upon his union, plaintiff decided to bring suit *pro se*, and accordingly on December 8, 1970, he filed his petition.

The record does not reflect a complete absence of diligence by the plaintiff after he exhausted his administrative remedies. He apparently mistakenly relied upon the willingness of his national union to take up the cudgels for him and a good deal of correspondence apparently took place between Germany and Washington during 1967, 1968 and 1969. When plaintiff found in July 1969 that his confidence in his union had been misplaced, he had to shift his focus and efforts. At the time he filed suit plaintiff was employed as a sales clerk, GS-3, in a United States Army commissary in Germany, at an annual salary of $5,212. It might well be argued that even as a *pro se* plaintiff did not have to wait 17 months to file suit after he knew he could not get his union to do it for him. However, it is difficult to be critical of the time taken by a non-lawyer to prepare and file a petition in the United States Court of Claims when he is stationed in a foreign country 3,000 miles away, must obtain his knowledge of the procedures by correspondence and must prepare a petition which will be legally adequate for the purpose, while at the same time earning a living in a relatively low-paying job in Germany.

The question of laches must be determined in terms of the particular plaintiff's diligence in overcoming barriers to bringing litigation in light of the difficulties and circumstances to be overcome. In *Powell v. Zuckert*, 366 F.2d

634 (D.C. Cir. 1966) the court held that difficulty in obtaining legal counsel by one who does not have the necessary funds to do so is a factor which must be taken into account in determining whether a plaintiff has been sufficiently diligent to overcome the bar of laches. In that case a former civilian employee of the Air Force took 16 months to bring suit largely because of his inability to secure legal assistance within his means until shortly before the conclusion of that period. The court found that he had not been lacking in diligence, stating that "[t]he claim that in this day and age poor people have no excuse for not obtaining counsel rapidly is simply nonsense." In *Motto v. General Services Administration,* 322 F. Supp. 1218 (E.D. La. 1971) the court held that an action filed 3 years and 5 months after plaintiff, a clerk with a modest income and family to support, was coerced into retiring was not brought too late in light of the facts he was ignorant of his rights, sought administrative relief through improper channels and spent a good deal of the period trying to find a lawyer who would effectively represent him at a fee within his means. In *Schwartz v. Secretary of Treasury,* 364 F. Supp. 344 (D.D.C. 1973), a plaintiff without the necessary financial means to bring an action, like Rifkin here, appealed to his union to support legal action on his behalf, which it finally agreed to do 2½ years later. The court stated that under such circumstances it was not persuaded that plaintiff's suit was barred by laches.

While plaintiff's delay was longer than that in some cited cases, his impediments were in some respects greater. He was never able to get his union's counsel to represent him in court despite his belief and the belief of his local that the union would do so; he earned a relatively modest wage and was unable to get a private lawyer to represent him; and living in Germany, several thousand miles away from

the court he obviously had some difficulty in convincing himself of his ability to handle litigation *pro se* in the Court of Claims and to acquire adequate knowledge of its procedures.

While it may be that had he been more sophisticated in the law and less willing to rely on the word of others, plaintiff could have proceeded with greater dispatch, it is not clear from the record as to the extent to which the delay which actually took place was attributable to fault and which to circumstances not inconsistent with diligence. It is probable that it is attributable to both. Laches is an equitable doctrine and should therefore be applied equitably. While it is appropriate that plaintiff should not put the Government at the disadvantage of duplication of salaries from his unjustified delays, at the same time it is equally improper for the Government to benefit from plaintiff's disabilities by denying him completely relief to which he might otherwise be entitled at least in part. As the court pointed out in *Cason v. United States,* 200 Ct. Cl. 424, 431, 471 F.2d 1225, 1229 (1973), "payment for work not done is a prejudice factor that is common to every back pay award", although it does not for that reason bar relief.

The theory underlying *Chappelle v. United States,* 168 Ct. Cl. 362 (1964), provides authority for a compromise solution here. There plaintiff had been removed from his position as an Air Force firefighter on February 15, 1955. He exhausted his administrative remedies on August 1, 1957. Almost 3 years later, on June 17, 1960, he brought suit in the District Court for the District of Columbia for restoration to his position. The suit was dismissed for laches and the dismissal was affirmed by the Court of Appeals and certiorari was denied. On February 26, 1963, by then 5 years and 7 months after he had exhausted his administrative re-

medies, plaintiff brought suit in the Court of Claims seeking compensation limited to the period in which he had pursued his administrative remedies plus 17 months. The court overruled the Government's defense of laches because plaintiff was asking for no more than that to which he had been entitled had he brought suit more promptly. Accordingly, the Government was not prejudiced by the delay to any greater degree than if plaintiff had brought the suit immediately. In *Cason v. United States*, 200 Ct. Cl. 424, 471 F.2d 1225 (1973), plaintiff, a Navy enlisted man, brought suit 6 years after his discharge. The court likewise found no bar of laches despite the lengthy period of delay because (among other reasons) it could only award him pay for the unexpired term of his enlistment, from May 20, 1964 to July 27, 1967, a 3-year period, and hence there was no greater prejudice to the Government by his further delay than if he had brought suit immediately after the exhaustion of his administrative remedies in April 1966.[8] *Compare also, Noble v. International Nickel Co.*, 77 F. Supp. 352 (S.D. W.Va. 1948); *Walsh v. Chicago Bridge & Iron Co.*, 90 F. Supp. 322 (N.D. Ill. 1949); and *Fortenberry v. Owen Brothers Packing Co.*, 267 F. Supp. 605, 607 (S.D. Miss. 1966), *aff'd*, 378 F.2d 373 (5th Cir. 1967).

In his reply brief plaintiff states that he has offered to waive any claim for the period between October 27, 1968 (18 months after April 27, 1967) and December 8, 1970, the date of filing his petition. Although the offer was made in the context of a proposed settlement, it is nevertheless reiterated in plaintiff's brief to the court. Since the prejudice to the Government in this case attributable to the plaintiff's delay is only fiscal, the *Chappelle* and *Cason*

[8] *See also* dissent in *Cason v. United States*, 198 Ct. Cl. 650, 659-60, 461 F.2d 784, 789-90 (1972), *rev'd on rehearing* in above.

cases furnish authority for such an equitable resolution of the laches problem here. However, since it has already been determined that for laches purposes plaintiff exhausted his administrative remedies as of December 7, 1966, rather than April 27, 1967, the laches bar begins 18 months thereafter and covers the period June 8, 1968 to December 8, 1970.

CONCLUSION

Ordinarily the proper resolution of a case such as this would call for a remand to the executive department for a proper exercise of discretion in light of the facts and law discussed. However, 10 years have now elapsed since the events at issue took place. Any remand would raise the possibility of further delays and appeals which would unduly occupy the time and attention of lawyers, administrative officials and judges for years to come. On an overall view of the evidence in the record and in light of the permanent adverse effect that plaintiff's single transgression has already had on what was up to then a promising career, it is concluded that a suspension without pay in excess of 2½ years for the plaintiff's offense would be unduly harsh and an abuse of discretion. Accordingly, in the ultimate interest of justice plaintiff's removal is invalidated and the penalty for plaintiff's misconduct is fixed at suspension without pay for a period of approximately 2 years and 6 months, *i.e.*, from June 8, 1968 to December 8, 1970, the period for which plaintiff is barred by laches. Plaintiff is entitled to be restored to his position, or an equivalent one in grade GS-12, with back pay for the intervening period with the exception of the time set forth above.

FINDINGS OF FACT

1. Effective September 17, 1965, plaintiff was removed from his position as comptroller, GS-12, United States Army Procurement Center, Frankfurt, Germany, on the determination of the commanding officer that he had altered and used an official document to defraud the United States Government.

In this action, commenced December 8, 1970, plaintiff, acting *pro se* alleges that his removal did not result in fair and equal treatment, that such action was "illegal", an "abuse of discretion" and "too harsh and out of all proportion to the offense charged" and accordingly seeks reinstatement and back pay. Additionally, plaintiff seeks full compensation for the period beginning April 13, 1965, through September 17, 1965, during which he was placed on annual leave and then leave without pay pending review of the proposed removal.

2. By order dated April 27, 1973, the court denied defendant's motion for summary judgment on the ground that "there remain unresolved and disputed issues of fact, in particular those relating to any possible *ex parte* evidence, any factors pertaining to plaintiff which might affect the application of the doctrine of laches to the case, and others". It remanded the case to the trial judge for appropriate proceedings toward resolution of the factual issues.

Trial was held in Washington, D.C., on August 28 and 29, 1974.

3. Plaintiff is a disabled veteran of World War II and Korea, with an aggregate of 23 years of Federal service.

In 1958, plaintiff was employed by the United States Army Procurement Center, Frankfurt, Germany, as an Accounting Officer, GS-10. In 1960, he was promoted to a Supervisory Accountant, GS-11, and on July 27, 1963, to the position of Comptroller, GS-12, which position he held until his removal when he was in the third step, with a salary of $10,960 per annum.

Throughout his employment with the Procurement Center plaintiff received consistently high performance ratings. In July 1960 and September 1962 he received "sustained superior performance" awards. As comptroller, plaintiff continued to be rated for outstanding and above average work and proficiency, and in the efficiency ratings dated March 31, 1963 and December 28, 1964, he was recommended for promotion to a GS-13 grade.

4. It was the responsibility of the comptroller's office to keep the financial reocrds as to the expenditure and availability of funds on procurement contracts throughout Europe and Africa having an average face value of over $400 million. As comptroller, plaintiff supervised from 35 to 40 persons whose functions essentially were to match requests for payment of obligations with supporting documents and records of funds on account, certify to the Procurement Division that the funds were available, and then record the expenditure. The office itself kept no cash and could only certify for payment requests supported by the appropriate documents, *e.g.*, contract, delivery order, travel order, none of which were within the purview of the comptroller's office.

5. Section 1-6 of CIVILIAN PERSONNEL REGULATIONS T3, CIVILIAN TRAVEL (Dept. of the Army, June 1961) provides that every civilian employee selected for assignment to oversea duty is required to sign a transporta-

tion agreement prescribing a stipulated period of oversea duty before transportation at Government expense may be authorized to the oversea area. Upon completion of the prescribed period of service the employee has a vested right to return transportation at Government expense. The standard agreement, DA Form 1321 (June 1, 1955) provides in part:

> Section 7.
>
> * * * * *
>
> ["]c. I fully understand that I will *not* be eligible for return transportation at Government expense to my place of actual residence at time of my appointment until I have remained the full period specified in a. above and that I will be responsible for my own transportation and that of my dependents, household goods and personal effects, if applicable, if I separate voluntarily or if I am separated involuntarily because of misconduct prior to completion of such period of employment unless reasons for voluntary separation are acceptable to the employing command."

The applicable tour of duty in plaintiff's situation was 24 months.

Section 2-11 of the same regulation provides that it is the policy of the Department of the Army to encourage leave between oversea tours of duty and to grant transportation to eligible employees to return to their places of residence on such leave. When an employee has completed the minimum period of service for the locality concerned, and has executed a DA Form 1321 for a new tour of duty at the same or different oversea post, reemployment leave travel orders may be issued. This entitles the employee

and his immediate family to transportation expenses from his duty post to his actual place of residence in the United States at time of appointment, and return. The prescribed tour of duty for the new transportation agreement begins as of the date the employee returns to a work status at his oversea station. Plaintiff and his wife sailed on the SS United States, departing Bremerhaven, Germany, on January 5, 1965, in accordance with plaintiff's reemployment leave entitlement.

6. It was the function of the Military Sea Transportation Service (MSTS) to procure space on commercial passenger ships for Department of Defense personnel and to assign accommodations to them. On authorization from Washington it purchased blocks of space each voyage on the basis of estimates of need. The system followed by the MSTS in assigning passengers on the commercial passenger ships during the 1960's when the Government purchased blocks of space on such ships is as follows: A list of the passengers was given by the sponsoring agency to the MSTS. The latter then listed all military passengers and government employees for each particular voyage in order of rank and grade. There was no fixed cut off defining those who were entitled to first class and those who were entitled to lesser accommodations. It depended on the actual breakdown of the travelers on a particular sailing. The best accommodations available were assigned to those of the highest rank and then in descending order of rank or grade, although generally all those in the same rank or grade and agency were given equal accommodations. A GS-12 might travel first class on a particular voyage, but on another voyage a GS-13 might travel in cabin class. Since a person's grade directly affected his standing on the list of passengers for billeting purposes, a person of higher grade had a better chance of traveling first class.

7. Plaintiff was listed with the MSTS as a GS-12. On this particular voyage GS-13's were placed in first class, GS-12's and below in cabin class. Accordingly plaintiff was assigned the latter. Sometime between Bremerhaven and Southampton, plaintiff presented to the assistant purser of the ship, Mr. Norbert Cano, travel orders indicating he was a GS-13. At Southampton this matter was called to the attention of the MSTS representative, Lt. Commander Lester P. Gorley, who, based on the order presented by plaintiff, obtained a first-class accommodation for plaintiff and his wife at an additional cost to the Government of $351.

8. A few days prior to the trip, on December 30, 1964, plaintiff had instructed his secretary, Mrs. Laurel Jean Coleman, to change the grade and salary designation on his copy of his travel orders from GS-12, $10,960, to GS-13, $12,075. Plaintiff then had several copies of the altered orders reproduced. It was a copy of this altered form that plaintiff presented to the purser once on board. Upon debarking at New York plaintiff made arrangements for his return travel again submitting the altered travel form, but after the disclosure of the alteration he requested the form be corrected before the return trip.

9. Since the MSTS records at Bremerhaven indicated plaintiff as a GS-12, its complaint was ultimately forwarded to Col. John T. McKee, Commanding Officer of the Army Procurement Center in Frankfurt, that it had been furnished with erroneous travel orders for plaintiff in that he had been designated at a level inferior to his actual rank. Colonel McKee initiated an investigation by the Criminal Investigations Detachment (CID).

10. On February 1, 1965, plaintiff was located and interviewed by the CID at the Beverly Hilton Hotel. The investi-

gator's memorandum indicates that plaintiff stated he had had his orders changed in Frankfurt to read GS-13 instead of GS-12; that plaintiff would not state the purpose for which this was done; that plaintiff stated he had contacted his commanding officer by telephone to apprise him of the situation and had been informed that he could finish reemployment leave and have a hearing upon his return to Frankfurt. The commanding officer's direction came in a telegram of January 28, 1965, stating that instead of attending a technical course for 2 weeks as planned and returning February 24, 1965, plaintiff should be ready for port call on February 8, 1965.

11. Colonel McKee retired from the Army on March 1, 1965. By that time he had not yet received a final report from the CID but had received sufficient information to believe the charges were true. At the trial in this proceeding he stated that he had recommended to his successor, Col. George E. Larsen, that plaintiff be removed for his misconduct because plaintiff had executed a false statement and used it with intent to defraud the Government and because Colonel McKee had been advised by his law officer, Maj. Eugene J. Murphy, and he understood that no intermediate form of punishment was possible. He stated:

> The only alternative, it seemed to me, and this is without looking up the regulations or having seen them for a long, long time, were rather minimal punishments, other than that.
>
> They were just almost like 30 days' suspension, as I recall.
>
> * * * * *
>
> It did not allow any variations in type of punishment, as I recall. That was one of the things.

12. On March 2, 1965, Colonel Larsen, as commanding officer, formally notified plaintiff of the proposed action to remove him from Federal Service, effective April 5, 1965. The Advance Notice of Proposed Removal stated, in pertinent part:

> 2. Specifically, you are charged with altering and using an official document to defraud the United States Government. Because of the serious nature of the offense, committed while you were in a position of trust in this organization, it is considered that the proposed action will promote the efficiency of the service. The following is furnished in support of the charge:
>
> a. On or about 30 December 1964 you instructed Mrs. Laurel Jean Coleman, an employee of the US Army Procurement Center, Frankfurt to change the grade and salary from GS-12, $10,960 to GS-13, $12,075 on a copy of your travel orders (AE Form 3282, Authority for Civilian Travel). You also instructed Mrs. Coleman to prepare a request for reproduction of the changed order. Mrs. Coleman complied with your instructions and the altered order was received by you the same day.
>
> b. On or about 6 January 1965 you presented to Mr. Norbert Cano, an assistant purser on the SS United States, AE Form 3282, Authority for Civilian Travel (order number 2061, Frankfurt Civilian Personnel Office, APO 757, US Forces, dated 18 December 1964) which had been altered to reflect your grade as GS-13

> and your salary as $12,075 p.a., and you knowingly used the altered Authority for Civilian Travel for fraudulent purposes in that you advised Mr. Cano of your desire to change your accommodations based on the grade GS-13 indicated thereon. At your request and by presentation of the altered Authority for Civilian Travel your accommodations were changed to First Class. AE Form 3282, Authority for Civilian Travel (order number 2061, Frankfurt Civilian Personnel Office, APO 757, US Forces, dated 18 December 1964) which was issued to you by the Civilian Personnel Office, Frankfurt Post, and a copy of which is on file in that office with the original stencil from which it was prepared, clearly indicates your grade as GS-12, and your salary as $10,960 p.a. which in fact are and were correct entries for your grade and salary.

13. At the request of plaintiff an informal meeting was held with Colonel Larsen on March 9, 1965. Also present were plaintiff's attorney, Mr. Walter O'Haire, and Maj. Eugene J. Murphy, Procurement Judge Advocate, and Lt. Col. David D. Langan, Jr., Executive Officer. Plaintiff admitted that the facts stated in the advance notice of proposed removal were true but that he hoped, through the presentation of mitigating circumstances, to obtain a reconsideration of the proposed disciplinary action. To this end plaintiff detailed his prior military and civil service record and then explained the circumstances of his "poor judgment" in having his travel orders altered. In essence, he asserted that the position of comptroller was deserving of a higher grade; that he had been somewhat depressed that he was only a GS-12, especially since many of his friends believed he held

a higher rating; and that his alteration of the form was in order to play a "practical joke" on his friends. He emphasized that in making this alteration he had no intention to defraud the Government. Plaintiff explained that once aboard ship he spoke with Mr. Cano, the assistant purser, about obtaining first-class accommodations by paying the difference in rates. According to plaintiff Mr. Cano said it would cost about $400 but "would not be worth it". Then, according to plaintiff, Mr. Cano stated that some majors get first-class accommodations, made reference to plaintiff being a GS-12, and inquired whether this was equivalent to a major. In a subsequent conversation with Mr. Cano, while under drugs,[1] plaintiff stated he was a GS-13 and offered the altered travel order to prove it. Shortly thereafter he and his wife were notified that they were being moved to first-class accommodations. To be "consistent" he submitted the altered orders when making return travel arrangements but "upon reflection" later requested a friend at the Brooklyn Army Terminal to correct his grade designation to GS-12.

Plaintiff stated that he was "very, very sorry" for his "poor judgment" and stated his desire and intention to reimburse the Government for the actual cost involved. In late March the MSTS ascertained and wrote to the Commanding Officer, United States Army Procurement Center that the exact amount was $351.70, which plaintiff promptly paid.

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[1] Plaintiff had taken some medically prescribed tranquilizers, the effect of which he described as "reducing his willpower" and making him "sleepy". His purpose in taking them was to be in top condition for the course he was to attend.

Plaintiff's formal written reply to the proposed removal was made on April 2, 1965. He reiterated his lack of intention to defraud the Government, he asked for consideration of his 23½ years of honorable and efficient service and he asserted that the punishment of removal for the one transgression was far out of proportion to the offense.

14. On April 7, 1965, Colonel Larsen advised plaintiff of his removal as follows:

> 1. * * * After careful consideration of these charges and your replies thereto, including the oral representations made by you and your attorneys on 9 March 1965 and 2 April 1965, it has been deciced that the charges are supported by substantial evidence. In summary, with respect to the charges of altering and using an official document to defraud the US Government, there were separate but related actions representing decisions by you: (1) the alteration of the travel order; and (2) the subsequent presentation of it to the purser of the SS United States in order to obtain first class accommodations. In view of your military service in the Finance Corps, including approximately seven years as a Lieutenant, your approximately two years as a Supervisory Accountant with the US Army Audit Agency, and over six years with the US Army Procurement Center Frankfurt as an Accounting Officer, Supervisory Accountant, and Comptroller, you were especially well qualified to be aware of the gravity and implications of your actions. Therefore, the charges are sustained and warrant your removal. Accordingly you will be removed from the Federal Service, effective 12 April 1965. You will remain in

a duty status with pay through the close of business 12 April 1965.

* * * * *

4. A review of your official personnel folder shows ineligibility for return transportation to the United States for you and your dependent wife, therefore, there is no provision for maintaining you in a duty or leave status in the event that an appeal is submitted by you. * * * You have the right to shipment of household goods * * * to your place of official residence in the United States. * * *

15. The decision to remove plaintiff included the considerations which follow:

(a) Neither Colonels Larsen, McKee, nor Major Murphy, their Judge Advocate and legal advisor, properly understood the process by which accommodations were assigned. They thought that by presenting the falsified order to obtain first-class accommodations, plaintiff was obtaining something to which he otherwise would never have been entitled. Therefore, they perceived plaintiff's offense as a deliberate attempt to defraud the Government.

(b) Although the consensus in the command was that plaintiff was basically honest and not a thief, and that he had been motivated by a need for prestige, rather than by the intent to defraud, this appraisal was apparently disregarded when the removal decision was made. Major Murphy advised Colonel Larsen that although as a man he sympathized with plaintiff and knew he would not steal a dime from the Army in his capacity as comptroller, he had to disregard that personal view both officially and as a lawyer.

(c) Major Murphy had advised his superiors that the permissible alternative punishments were very limited. According to Major Murphy, demotion or transfer was illegal, and a suspension had to be limited to a maximum of 30 days. Both Colonel Larsen and McKee testified that removal was decided upon because the only other alternative, a short suspension, seemed too lenient a punishment.

16. The Department of the Army Civilian Personnel Regulations, CPR C2, Conduct and Discipline, in effect during 1965 provides at paragraph 1-6:

b. Included in appendix B are tables setting forth penalties for various offenses. These tables include both mandatory penalties, i.e., those prescribed by law or by regulations of the Civil Service Commission, and discretionary penalties, i.e., those which the Department views as reasonable for a particular offense. The range of the discretionary penalties listed will be used as a general guide in administering discipline to assure that comparable disciplinary actions are taken for comparable offenses. * * *

The suggested schedules of penalties (Appendix B) provides:

Table I. Penalties for Delinquency or Misconduct

This table of penalties for delinquency or misconduct will be used as a general guide in imposing disciplinary action to assure like penalties for like offenses throughout the Department of the Army. The list of offenses and suggested penalties set forth below may not successfully meet the

demands of all situations and therefore is to be considered as suggestive only. Final decision as to the action to be taken will rest with the responsible administrative officials. * * *

Offense	Penalties First Offense
* * * * * * * * *	
9. False statements, misrepresentation, or fraud in application blank or other official records submitted to the Department of the Army. Apparent oversights and errors, where satisfactorily explained, may be excused where not otherwise disqualifying.	5- to 10-day suspension, or removal.

17. The regulations governing appeals from adverse actions are contained in CPR E2.5 (June 1962). The employee's appeal is to the major commander. (¶ 5-2.b.) The major commander in this case was the Commander in Chief Europe (CINC USAREUR). The employee is furnished a list of at least three potential grievance examiners from which he selects one to investigate the appeal. The list furnished may not include any individual on the staff of the employee's servicing civilian personnel office, nor any individual directly involved in the action being appealed. (¶ 5-2.c.)

The grievance examiner is to conduct "such inquiry as is necessary to develop all the facts relevant to the issues in the case," including a hearing if requested by the employee. "Consideration will include both the merits of the case and compliance with applicable policies, regulations and procedures." (¶ 5-3.2.) The hearing is a full evidentiary-type

proceeding. Both sides may be represented by counsel, testimony is under oath and a transcript of the proceedings is prepared. (CPR E2, app. I.) The evidence produced is to consist of written sworn statements by witnesses and appropriate certifications of authenticity in the case of copies or official records. Before the hearing each side is given the opportunity to review each document. (CPR E2.5-3.c.) The regulations further provide (CPR E2, app. I, para. 6):

> *b.* The Grievance Examiner will advise participants as follows:
>
> * * * *
>
> (2) Of their obligation to–
>
> * * * *
>
> *(b)* Introduce all evidence or other testimony at the hearing. In this connection, it is important for all persons to be advised that no pertinent evidence should be withheld since in case of review by higher authority, such review is made on the basis of the original record, unless new evidence not possessed at the time of the hearing is subsequently introduced.

Upon completion of the inquiry the grievance examiner prepares a report for the major commander detailing his findings and conclusions on each issue considered. The appeal record is then forwarded to the major commander. In this kind of case the regulation provides that such report, together with (1) the employee's written appeal, (2) the transcript of summary of any hearing held, (3) exhibits introduced at the hearing and (4) an organization chart showing the employee's location in the organization, are to be forwarded to

the major commander. An information copy of the report may also be furnished to the local commander who, if the facts warrant, may cancel the adverse action, but may *not*, however, substitute a lesser penalty. (¶ 5-4.a.,b.) After his civilian personnel staff has reviewed the record to assure basic compliance with the law, regulations and procedures, the major commander is to "prescribe the methods and procedures for accomplishing the consideration" of the merits. (¶ 5-5.a.) The major commander may then "sustain the adverse action, substitute a less severe action, or reverse the action in its entirety." In the case of an adverse decision he must inform the employee of his right to request review by the Secretary of the Army and to appeal to the Civil Service Commission. (¶ 5-5.b.)

18. The appeal procedures also contain a section, "Special Provisions for Oversea Employees" which provides, in pertinent part:

> 5-8. In processing an action under CPR S1 discharging for cause a United States citizen employee serving overseas who is eligible for return transportation at Government expense, or, who is ineligible for such transportation but who cannot remain in the oversea area after separation because of immigration requirements and/or agreements requiring repatriation to the country of residence, the special provisions set forth below will be applicable. * * *
>
> * * * * * * *
>
> *c.* If the employee files an appeal and requests authority to remain in the command, the installation will extend the notice period and inform the employee that he will be retained at the installation in a duty status pending the hearing and final disposition of the appeal at the major command level. Should the reasons for the removal action preclude retaining him on duty, he will be retained at the installation but suspended without pay. The suspension must be processed under CPR S1 as a separate personnel action. The employee may also be permitted to remain at the installation in annual leave or leave without pay status *provided the submission of a written request for such leave is a completely voluntary action on the part of the employee.* Enforced annual leave will not be directed by the installation for the purpose of removing the employee from a duty status.

19. On April 9, 1965, plaintiff and his counsel met with Colonel Larsen concerning plaintiff's intent to appeal the adverse action. Also present were Major Murphy, Procurement Judge Advocate, and Mr. Rowe, Civilian Personnel Officer. Colonel Larsen had previously been alerted by these advisers that plaintiff was likely to request to remain in a duty or pay status pending the appeal, but that this could not be granted under the regulations. Colonel Larsen testified that he had been told:

> [t]he regulations provided that in order to stay in the command on a duty status you had to be entitled to return transportation to the United States, and since Mr. Rifkin had just used his entitlement by means of a round-trip to the United States just shortly before this, he was not entitled to return transportation to the United States.

When Colonel Larsen asked plaintiff about this, plaintiff told him that he did intend to request duty status and that the letter of appeal he had prepared so stated. Colonel Larsen

instructed plaintiff that the request could not be granted and instructed that plaintiff would have to request annual leave or leave without pay status. Despite their objections, plaintiff and his counsel redrafted the letter requesting that plaintiff be granted "authority to remain in the command in a duty and pay status, or on annual leave or leave without pay status, pending the hearing and final disposition of this appeal at the major command level concerned."

Colonel Larsen then amended his April 7, 1965 decision to allow plaintiff to use his annual leave until April 29, 1965, when it ran out, and then to remain in a leave without pay status. The decision stated:

> * * * However, in order to minimize personal hardship to you and your family during the period of appeal, paragraph 1, reference 1c is amended to delete 12 April 1965 as the effective date of your removal. I find no justifiable basis for continuing you in a duty status pending the receipt of a decision on your appeal. I do approve your request for annual leave and leave without pay during this period beginning at 0730, 13 April 1965. * * *

This enabled plaintiff to retain certain Armed Forces advantages such as commissary and post exchange privileges.

20. Pursuant to plaintiff's appeal to the Commander in Chief, Europe (CINC USAREUR), a hearing was held on May 24, 1965, in Frankfurt, Germany, before a grievance examiner. Plaintiff was represented by counsel throughout the proceedings.

21. The grievance examiner, in her Report of Inquiry found that the Government did not dispute that this was

Mr. Rifkin's first offense in his 20 years of Federal service. With respect to his intent to defraud the Government out of the $351 she found that "there is no regulation which states that Mr. Rifkin was *not*, even as a GS 12, precluded from first class accommodations," and that a question remained as to whether the Government's loss on one particular sailing day would not have been "considered an acceptable conditioi at another time." She also found–

> * * * Efficiency ratings and performance charts indicate that Mr. Rifkin has always performed his work in a satisfactory, and often, outstanding manner. His length of service and his education also bear on his ability to perform in a capable and competent way. Thus, I find that where management has spoken of his removal promoting the efficiency of the Federal service, they have succeeded in showing only that his removal from a position of high trust at the U.S.A. Procurement Center, Frankfurt would promote the efficiency of that particular organization. There is doubt in my mind that this one dishonest act would make him altogether ineligible for a similar position of trust in another branch or organization of Federal service, especially in view of the fact that Mr. Rifkin's lapse from honesty had no bearing upon the performance of his duties, and since, in his long years of service, he has never betrayed trust concerning those duties, I find no reason why Mr. Rifkin could not continue to give years of valuable service to the U.S. government at some other installation and, perhaps, in some other capacity.

It was her recommendation that "the removal action be withdrawn as being too severe a punishment for the nature, degree, and intent of the conduct, and a lesser punishment be substituted which is more commensurate with the offense," to wit:

1. Transfer to another organization in another location.

2. Suspension with resultant loss of pay not to exceed a period of six months, including any period since the initiation of the adverse action for which monetary compensation has not been received.

3. Reduction to a lower grade and position in which the appellant is not responsible for the handling and disbursement of funds, and/or change to a non-supervisory position. (see CPR S1; 3-11A3b)

4. The hardship, anxiety, and mental anguish which the appellant has already suffered since the initiation of the adverse action.

22. Both prior and subsequent to the grievance examiner's report, Colonel Larsen discussed plaintiff's appeal with his superior, Maj. Gen. R.C. Kyser, Commanding General, United States Army Communications Zone, Europe (COMZ), and the General's assistant, Colonel Maffeo. Colonel Larsen testified that all of his "actions with regard to this was to keep the command informed." In this connection, on May 20, 1965, just prior to the hearing, Colonel Larsen sent them a "memorandum for record" summarizing the facts, considerations, and issues presented in the appeal.

23. United States Army, Europe, Regulation No. 690-32, Civilian Personnel, Grievance and Appeal Procedures, dated 8 February 1965, provides in part:

> 6. *Processing Appeals From Adverse Actions.*
>
> a. An information copy of the Report of Inquiry and Grievance Record, which is forwarded directly to the Personnel and Administration Division, Headquarters USAREUR (CPR E2.5-4b), will be transmitted to the appropriate area commander. When the activity concerned reports directly to a staff division of Headquarters USAREUR, a copy of the Report of Inquiry and Grievance Record will be forwarded to the head of that staff division.
>
> b. Immediately on receipt of the copy of the Report of Inquiry and Grievance Record by the commander indicated in a above, a qualified staff officer will be designated to analyze the appeal and recommend appropriate action.
>
> c. The commander or his designated representative will take one of the following actions within 12 calendar days after receipt of the appeal and report his action or recommendation to the Personnel and Administration Division, Headquarters USAREUR:
>
> (1) Decide in favor of the appellant, take appropriate remedial action, and report the decision.
>
> (2) Recommend that the appeal be denied and provide a summary of the reasons.
>
> (3) Recommend that the penalty that formed the basis for the appeal be reduced. The new pro-

posed penalty and the reasons for it will be provided as a part of the recommendation.

24. On July 2, 1965, without furnishing a copy to plaintiff, Major General Kyser wrote to the Commander in Chief, Europe, the "major commander" under the regulations, as follows:

1. In compliance with requirement contained in USAREUR Regulation 690-32, paragraph 6b, analysis of the transcript of the Harold D. Rifkin grievance hearing has been completed.

2. In summary, the record clearly reveals that Mr. Rifkin caused official travel orders to be changed to falsely reflect that he was a GS-13 employee, and that he used these orders (knowing that they were false) to obtain first class passage aboard the SS United States. Evidence also clearly establishes that Mr. Rifkin knew he was a GS-12 employee and as such not entitled to first class passage. That fraud against the United States was committed is adequately established.

3. Actions such as those taken by Mr. Rifkin, as described in the grievance hearing, support the conclusion that his sense of propriety, judgment, and conduct are grossly less than this command must require and receive from personnel assigned highly responsible leadership and fiduciary responsibilities. This conclusion is inescapable in view of the employee's work history and related exposure to mandatory ethical standards inherent in all positions peculiar to his field of assignment.

4. If tried by a civilian court, and found guilty, Mr. Rifkin could be sentenced to a fine of up to $10,000 and imprisoned for up to five years. A General Court could for the same offense sentence a military man to Dishonorable Discharge, confinement for up to five years and total forfeitures.

5. Exemplary standards of professional conduct are mandatory for all those assigned positions of trust. As a minimum, the U.S. Government must demand and receive absolute honesty and integrity of its employees. The removal of an employee who has failed in this respect is necessary to "promote the efficiency of the service." The retention of an employee who is known to have committed a fraud against the United States could and probably would unfavorably affect the morale, integrity and high standard conduct of other Government employees.

6. I do not concur in the recommendation of the grievance examiner that the removal action is too severe, and that it be withdrawn and a lesser punishment be substituted.

7. Recommend that Mr. Rifkin's appeal be denied and that the removal action and decision taken by the Commanding Officer, U.S. Army Procurement Center, Frankfurt, be sustained.

25. On July 27, 1965, an Employee Appeals Review Board, which in this instance consisted of two Army officers and one civilian employee, appointed and convened by Headquarters, U.S. Army, Europe, to recommend a decision to

the Commander in Chief, Europe, considered the appeal. It concluded unanimously:

> a. That the charge of altering and using an official document to defraud the United States Government is supported.
>
> b. The decision to remove Mr. Rifkin from the Federal Service is in line with the Civilian Personnel Regulation CPR C2, dated February 1964, and for the good of the Federal Service.
>
> c. Relief sought by appeallant should not be granted due to the seriousness of the act committed and the comparative possible sentences if found guilty in a civilian or military court.
>
> d. The recommend action to remove Mr. Rifkin from the Federal Service in considered appropriate.
>
> 6. *RECOMMENDATION: That Mr. Harold S. Rifkin's appeal be denied and his removal from Federal Service be finalized.*

On August 30, 1965, plaintiff was notified that the Commander in Chief, Europe, had decided that a thorough review of the appeal record provided no basis for setting aside or modifying the decision of the Commanding Officer, U.S. Army Procurement Center, Frankfurt, Germany, and that the appeal record "clearly supports the charge that you did alter and use an official document to defraud the United States Government." He was also notified of his right within 10 days to seek review of the decision either to the Secretary of the Army or the Civil Service Commission, but not both.

26. C6, CPR S1.2-6a(2) provides in part:

> (i) If an employee elects to appeal under CPR E2 within the time limit prescribed therein, he will also be entitled to appeal to the Commission or to the Secretary, but not both, after a notice of decision from the *first appeal level* within the Department. The time limits for such further appeal are not earlier than receipt of the notice of first level appeal decision and not later than 10 calendar days after receipt of such decision.
>
> * * * * *
>
> (iii) If upon receipt of a first appeal level decision under CPR E2 an employee elects to appeal to the second appeal level within the Department, he forfeits his right of appeal to the Commission.

On September 20, 1965, plaintiff elected to seek review by the Secretary of the Army contending that "in view of my record of over twenty-three (23) years of unblemished service, the penalty of removal is grossly excessive and not warranted by the acts complained of and it is therefore sought to have my removal set aside." With respect to an appeal of the major commander's decision to the Secretary of the Army the regulations provide:

> 5-6. *a.* An employee who receives an adverse decision from a major commander has the right to request review of that decision by the Secretary of the Army. He may do so by filing a written request through command channels within 10 calendar days from the date of receipt of

the major commander's decision. The request must state the specific reasons on which it is based, and the corrective or remedial action sought.

(1) The employee's request for review will be added to the appeal record along with any comments the activity commander or major commander wish to make, and will be forwarded through channels to the Office, Secretary of the Army. * * *
[CPR E2.5]

Plaintiff's appellate brief was submitted on December 30, 1965, and was transmitted to the Secretary on January 17, 1966. In addition to challenging the harshness of the adverse action and reversal of the grievance examiner plaintiff also made many other contentions, including a claim of discriminatory treatment of civilian personnel vis-a-vis military personnel by comparing his case to that of a military officer assigned to the Procurement Agency who allegedly received substantially less punishment for a similar offense, and that the commanding officer was motivated by the desire to fill plaintiff's position with a military officer.

On February 15, 1966, the Secretary requested further information concerning these allegations from Headquarters, US Army Communications Zone, Europe. A reply was transmitted to the Secretary on March 2, 1966.

27. The March 2, 1966 letter from the Commander in Chief, Europe, indicated considerable reliance upon the contents of Major General Kyser's *ex parte* letter of July 2, 1965 (finding 24, *supra*). It stated (in part):

2. The Commander in Chief, United States Army, Europe made his decision to uphold the

removal of Mr. Harold S. Rifkin on two basic considerations, (a) full agreement with the recommendation of the Commanding General, United States Communications Zone, Europe and with the unanimous decision of the USAREUR Appeal Review Panel and (b) the nature of the offense and the position of responsibility and trust occupied by Mr. Rifkin.

3. In a letter dated 2 July 1965 the Commanding General, United States Army Communications Zone, Europe, stated in part: "Actions such as those taken by Mr. Rifkin, as described in the grievance hearing, support the conclusion that his sense of propriety, judgment, and conduct are grossly less than this command must require and receive from personnel assigned highly responsible leadership and fiduciary responsibilities. This conclusion is inescapable in view of the employee's work history and related exposure to mandatory ethical standards inherent in all positions peculiar to his field of assignment." The Commanding General, USACOMZEUR further states: "Exemplary standards of professional conduct are mandatory for all those assigned positions of trust. As a minimum, the US Government must demand and receive absolute honesty and integrity of its employees. The removal of an employee who has failed in this respect is necessary to promote the efficiency of the service. The retention of an employee who is known to have committed a fraud against the United States could and probably would unfavorably affect the morale, integrity

and high standard conduct of other Government employees."

The March 2, 1966 letter further indicated that the Commander in Chief's decision was also based upon his understanding that "Mr. Rifkin did utilize an altered travel order to arrange for himself and his wife Government-paid first class accommodations to which he was not entitled as a GS-12." There was "fraudulent action of obtaining accommodations to which he and his wife were not entitled aboard the S.S. United States." And "the evidence reveals a fraudulent alteration of an official travel document and a planned scheme to defraud the US Government." It found no improper discrimination in the lesser punishment meted out to the military officer, because his false statement incident to travel was not a fraudulent one since he did not request reimbursement from the Government.

28. After considering the issues raised in plaintiff's appeal, in April 1966 the Department's Policy and Grievance Review Board reported that it had considered the plaintiff's arguments and the grievance examiner's opinion and recommendations, and found no basis for setting aside the removal order and hence recommended affirming of the decision of the major commander. In its determinations and conclusions it stated:

> b. The Board determined that the charge of altering and using an official document to defraud the United State Government was supported by substantial evidence and warrants the action taken in appellant's case. * * * [t]he record discloses that appellant was entitled to cabin class accommodations based on his GS-12 grade.

> c. * * * [T]he Board noted the recommendations of the Grievance Examiner for a lesser penalty, to wit, transfer to another organization, suspension not to exceed six months or reduction to lower grade. The Board disagreed with the Examiner's reasons for her recommendations in this matter, i.e., that the appellant was innocent of the first charge and that the second charge, albeit valid and supported by the evidence precluded "enforcement of the maximum penalty of removal" because of the existence of mitigating circumstances. The Board felt that the specifications of both charges, as drawn, are supported by substantial evidence and were neither denied nor satisfactorily refuted by appellant or his attorney. The seriousness of the charges when viewed in light of appellant's official position appears to negate the effect of the "mitigating circumstances" considered by the Examiner. In response to the inquiry made by the Board regarding severity of penalty, Headquarters, USAREUR stated: ". . . Mr. Rifkin was responsible for the certification of funds and the financial management of a procurement activity which has contracts throughout Europe and Africa with a face value over 400 million dollars and obligations last year of 174 million dollars. A person in this position must exemplify the highest standards of conduct and personal integrity. Mr. Rifkin's deliberate action to defraud the United States necessitated his removal. Lesser action would demean the Federal Service and fail to uphold the Code of Ethics for Government Service and the Department of the Army's Civilian Personnel Regulation CPR C2, Conduct and Discipline

. . . ." The Board agreed with USAREUR's position in the matter * * *. Mr. Rifkin's actions which gave rise to the charges are deemed to be intolerable and are not those expected of an employee holding a position of trust. Moreover, and particularly in view of his long period of service and experience, there is no reason to believe that he was unaware of his improprieties and the serious implications thereof. In light of the above, it is considered that management's action was reasonable and equitable and not out of proportion to the character of the offenses committed.

29. By letter of April 27, 1966, the Deputy Under Secretary of the Army for Manpower on behalf of the Secretary advised the plaintiff that the decision of the Commander in Chief, Europe, sustaining his removal was affirmed, the penalty being deemed "appropriate in light of the nature of your offenses and your position of trust."

30. The issue of possible use of *ex parte* evidence in plaintiff's case was first raised on behalf of plaintiff by the American Federation of Government Employees in a letter dated June 3, 1966, to the Director of Civilian Personnel, Department of the Army.

31. By letter dated July 28, 1966, the Assistant Deputy Chief of Staff, Civilian Personnel, furnished plaintiff's attorney copies of three documents: (1) the comments on plaintiff's appellate brief that were furnished the Secretary of the Army by the Commander in Chief, U.S. Army, Europe (see finding 27); (2) the letter dated July 2, 1965, from Commanding General, Communications Zone, Europe, to Commander in Chief, U.S. Army Europe (see finding 24); and (3) the memorandum from the Appeal Panel to the De-

puty Chief of Staff, dated July 27, 1965, setting forth its recommendations (see finding 25). Plaintiff's attorney was advised that he could submit any comments on the documents, and, under date of August 22, 1966, did so submit his comments which were forwarded to the Office of the Under Secretary, Department of the Army, for consideration. In his letter, plaintiff's attorney responded in detail charging that plaintiff's rights had been prejudiced by the *ex parte* communications, particularly numbers (1) and (2), and he pointed out alleged errors and misstatements therein, paragraph by paragraph.

32. The Employment Policy and Grievance Review Board, Department of the Army, Washington, D.C., which reconvened to consider the August 22, 1966 letter from plaintiff's attorney, issued a supplemental report. With respect to *ex parte* communication No. (1) the board noted that the letter from USAREUR, dated March 2, 1966, was prompted by a request from the board for clarifying information with respect to the severity of the penalty, the facts concerning the military officer who was supposed to have been treated more leniently and the commander's purported intention to replace plaintiff with a military officer, all matters which had been raised in the brief of plaintiff's attorney to the board and with respect to which the board needed supplemental information. With respect to *ex parte* communication No. (2), the July 2, 1965, letter from Major General Kyser to the Commander in Chief, United States Army, Europe, the board said that it considered such comments only with respect to the specific questions mentioned above. The board further noted that since it had given plaintiff's attorney an opportunity to respond to all three communications and had considered his response in its supplemental report and found them insufficient to modify its previous decision,

plaintiff was not prejudiced. Accordingly it recommended reaffirmance of the department's decision of April 27, 1966. On November 25, 1966, the Deputy Under Secretary of the Army advised plaintiff that it had been determined that there was no reason for modifying the department's decision of April 27, 1966.

33. Just prior to receiving this decision, on November 22, 1966, plaintiff's attorney again wrote to the Secretary of the Army contending that wholly apart from the removal plaintiff had been wrongfully deprived of duty status pending his appeal to the major commander level. At the same time plaintiff's attorney claimed to have discovered new evidence of discriminatory treatment in that Mr. James H. Rowe, the Civilian Personnel Officer at the Procurement Center, who within the prior week had not been removed but had received substantially lesser punishment for an allegedly similar offense. The Army's response of December 7, 1966, summarily dismissed the issue of duty status on the ground that he was not eligible therefor under the regulations. In another communication not in the file the Army apparently requested further information concerning the Rowe case which was submitted by plaintiff's attorney on January 6, 1967. Inquiry into that case was thereafter made by the Employment Policy and Grievance Review staff. The record disclosed that Rowe, who as the civilian personnel officer, had recommended to Colonel Larsen that plaintiff be dismissed, was himself found to have made false statements to the Government. As qualification for his position he claimed educational credit for a number of college courses which he had never taken. Upon disclosure, Mr. Rowe was reprimanded and allowed to accept as punishment a voluntary demotion from grade GS-14 to GS-13 at an approximately $300 reduction in pay and transferred to a similar position at another

location in Germany. By letter of April 27, 1967, plaintiff was advised that the two cases were not comparable because in Mr. Rowe's case there was no evidence of intent to defraud the Government for personal gain or material benefit received from the falsification and a comparison with this case furnished no grounds for modification of the removal action against Rifkin.

34. On June 2, 1966, plaintiff through his attorney appealed his removal to the Civil Service Commission stating that, as a disabled veteran, he was basing his appeal on the "Veterans Preference Act of 1944, to wit, 5 U.S.C.A. Sec. 863." On June 29, 1966, the Civil Service Commission's Appeals Examining Office disallowed plaintiff's appeal because he had exhausted his appellate rights by choosing to appeal his case to the Secretary of the Army. On September 8, 1966, the Civil Service Commission's Board of Appeals and Review affirmed that decision.

35. During 1966 plaintiff's wife wrote letters to the President of the United States about her husband's case, reiterating the claims of excessive punishment and discriminatory treatment. This matter was referred to the Equal Employment Opportunity Officer of the Department of the Army, who on September 22, 1966, rejected her complaint because it was untimely. Plaintiff and his wife then made repeated efforts to obtain a reversal by the Civil Service Commission of that dismissal. The Civil Service sustained the Army's decision, most recently on April 13, 1967.

36. During the time he was stationed in Germany, plaintiff had been an organizer of the American Federation of Government Employees Lodge 2348, headquartered in Frankfurt, Germany. He had served as the organization's treasurer and chief steward. Beginning in May 1966, a vigorous cam-

paign was conducted by Lodge 2348 to obtain the assistance of the national president of AFGE for plaintiff's appeal. As a result of this urging, the national president, J.F. Griner, wrote to the Director of Civilian Personnel, Department of the Army, concerning the possible reliance on *ex parte* evidence during plaintiff's appeal. See finding 27.) Following the Army's determination on November 25, 1966, that there was no reason to modify its previous decision of April 27, 1966, and the Civil Service Commission's disallowance of plaintiff's appeal on September 8, 1966, Lodge 2348 made an intense effort to have plaintiff's further appeal efforts prosecuted by the Legal Rights Committee of the AFGE. In July 1967, plaintiff's entire record was forwarded from Germany for review by AFGE general counsel, Edward L. Merrigan, in Washington. By letter of September 26, 1967, to John F. Griner, forwarded to Lodge 2348 on October 11, 1967, Mr. Merrigan recommended that the case not be financed out of the Legal Rights Fund because, although the case was of great importance to plaintiff and his associates in Frankfurt, "the issues involved do not have clear cut general applicability and same would not be of great interest to Federal employees or AFGE members generally". On October 18, 1967, Fred Milhado, vice president of plaintiff's lodge, again wrote to John Donovan, national vice president of AFGE at Washington, urging reconsideration of this decision and pledging to "personally conduct a campaign for contributioins to the Legal Rights Fund to cover the financing of this case." Pursuant to Donovan's suggestion, Milhado then pleaded plaintiff's case to President Griner in a personal letter sent to his residence on March 19, 1968. On March 26, 1968, President Griner recommended to Mr. Merrigan that the appeal be undertaken; Mr. Merrigan, in a letter of May 8, 1968, responded that the issue of the case was of too narrow application, but suggested that if the case is

filed, "Mr. Rifkin himself or his close associates in Germany should consider bearing all or at least a significant portion of the legal fees and litigation expenses involved."

On October 18, 1968, Donovan wrote Frankfurt asking that they "confirm that your Local is willing to underwrite 50 percent of the cost of this case so that I may once again have action resumed on behalf of Mr. Rifkin". The local's response, dated November 16, 1968, reveals a disagreement as to the financial arrangement. The local had, apparently, already sent $500 to the Legal Rights Fund and expected that with this donation the case would already have been filed. Donovan's request for confirmation that Frankfurt was willing to pay one-half of the fees was reiterated in a letter of November 18, 1968. On January 27, 1969, Murray Sentner, president of Local 2348, advised the national office that the Local could not afford to send any more money at that time, but that if the case was prosecuted "I'm confident that later in the year we would be able to make another significant contribution to the Legal Rights Fund." He suggested that if successful Mr. Rifkin would also make a contribution.

The record does not disclose precisely when the national office advised Local 2348 of its decision not to prosecute plaintiff's appeal, but the union's notification of this fact to plaintiff on July 17, 1969, refers to "correspondence recently received". The record also shows that on August 28, 1968 and May 21, 1971, plaintiff contacted two different law firms in the United States in an unsuccessful attempt to obtain counsel for his appeal, apparently on a contingent-fee basis.

37. By letters dated September 12 and October 21, 1969, the Greater Frankfurt/Main Lodge 2348, American Federation of Government Employees, Frankfurt/Main, Germany,

requested the Secretary of the Army to amend the Standard Form 50, which was used in separating plaintiff from employment with the Federal Service, to omit the reference to fraud. SF 50, dated September 15, 1965, that was issued to plaintiff at the time of his removal from the Federal Service stated thereon, under Item No. 30, "Remarks", that plaintiff was separated for the reason "Employee altered and used an official document to defraud the United States Government." On December 29, 1969, the Director of Civilian Personnel, U.S. Army, Europe, denied the union's request on the ground that the statement was factually accurate.

38. From March 1, 1965 to January 1970, the comptroller position at the U.S. Army Procurement Center, Frankfurt, was held by various persons, both military and civilian employees, until the Office of Comptroller was abolished on January 2, 1970, due to a reorganization, and a new office entitled "Accounting and Budget Office" was established. The designation U.S. Army Procurement Center, Frankfurt, was changed to U.S. Army Procurement Agency, Europe.

39. Subsequent to his removal as comptroller, plaintiff continued to live in Germany. The record shows that on October 9, 1970, he was temporarily employed as a sales store checker, GS-3, Step 1, at the U.S. Army Commissary, Darmstadt, Germany, at an annual salary of $5,212. Sometime thereafter he was promoted to supply clerk, GS-4, Step 10, at a salary of $9,358, and on July 29, 1974, he was again promoted to supervisory supply clerk, GS-5, Step 10, at a salary of $10,467.

CONCLUSION OF LAW

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to judgment ordering his restoration to his former position in the Department of the Army or to an equivalent position in grade GS-12, and that plaintiff is entitled to back pay from April 13, 1965, until the date of such restoration to duty with the exception of the period from June 8, 1968 to December 8, 1970.

IT IS THEREFORE ORDERED, pursuant to 28 U.S.C. § 1491 and Rule 147(c), that the Secretary of the Army be and he is hereby directed to reinstate plaintiff to the position he formerly held or an equivalent position at the same grade.

IT IS FURTHER ORDERED, that the amount of recovery due plaintiff will be determined in further proceedings pursuant to Rule 131(c).

IN THE UNITED STATES COURT OF CLAIMS

No. 437-70

HAROLD S. RIFKIN

v.

THE UNITED STATES

Before DAVIS, *Judge*, Presiding, SKELTON and BENNET, *Judges*.

ORDER

This case comes before the court on plaintiff's motion, filed May 19, 1976, for rehearing pursuant to Rule 151, to amend or alter the judgment entered herein on April 14, 1976. Upon consideration thereof, together with the response in opposition thereto, without oral argument,

IT IS ORDERED that plaintiff's said motion for rehearing filed May 19, 1976, be and the same is denied.

BY THE COURT

/s/ Oscar H. Davis
Oscar H. Davis
Judge, Presiding

June 25 1976